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In The
Supreme Court of the United States

LUIS POSADA CARRILES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does *United States v. Kordel*, 397 U.S. 1 (1970), allow the government to hide a criminal investigation behind a pretext naturalization "interview" under oath of an indefinitely detained individual, and then engage in fraud, deceit and trickery to mislead him as to the true purpose of the "interview" to avoid constitutional protections?

Where an applicant seeking immigration benefits is permanently, statutorily barred from qualifying for immigration benefits sought due to a conviction for an aggravated felony, is the United States Customs and Immigration Service (USCIS) required to interview the applicant before denying the application, or does the applicant have a due process right to an interview?

Does *Kordel* apply to an under oath interview or statement of an individual seeking immigration or other government benefits?

Where the government, as a part of its routine practice, provides warnings to applicants seeking immigration benefits informing them that false statements or information could subject them to civil or criminal liabilities and that they have a right to remain silent, but then threatens that failure to answer a question or interruption by the applicant's counsel could cause USCIS to terminate the interview and use it against

QUESTIONS PRESENTED – Continued

them as a basis to deny immigration benefits, do such warnings bar a Fifth Amendment challenge even where the government hides the true nature of the interview through trickery, deceit or misrepresentation to avoid constitutional protections?

Where the USCIS provides an interpreter for a naturalization applicant, does the applicant have a due process right to a competent interpreter?

Is a defendant charged with false statement offenses who asserts denial of due process in that the government engaged in outrageous misconduct, including fraud, trickery and deceit in extracting allegedly false statements during an under oath interview, required to show "government over involvement combined with a passive role by [himself]" in the charged false statements offense as would be required for an entrapment defense?

Rule 403 of the Federal Rules of Evidence permits exclusion of relevant evidence if, *inter alia*, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Where an accused seeks to exclude oral sworn statements obtained through questions posed through an interpreter, and thereafter used as the basis for an indictment for false statements, may the trial court exclude the entire transcript and oral statements based upon Rule 403 where, after a full examination of a recording and transcript of the

QUESTIONS PRESENTED – Continued

statements, the trial court finds that the interpreter interpreting the questions was inherently incompetent and unreliable, and that the probative value of the interpretation and translation is substantially outweighed by its prejudicial effect? Or, in such instances, may the trial court only examine the particular questions and answers charged in the indictment for a "fundamental ambiguity," without applying Rule 403 to the entire recording and transcription?

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PETITION FOR CERTIORARI REVIEW

Luis Posada Carriles (Posada) respectfully petitions for a writ of certiorari to review the Fifth Circuit's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1) is reported at 541 F.3d 344 (5th Cir.2008). The opinion of the district court dismissing the indictment below (App.48) is reported at 486 F.Supp.2d 599 (W.Distr. Tex. 2007).

JURISDICTION

The Fifth Circuit entered judgment August 14, 2008. The Court denied Posada's petition for rehearing *en banc* on September 24, 2008. On October 29, 2008, Justice Scalia extended the time to file a petition for writ of certiorari to February 23, 2009. App. No. 08A373. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law * * * .

STATEMENT OF THE CASE

When the government pursues an individual for alleged misbehavior in simultaneous civil and criminal investigations, there is a tension between the government's power to compel testimony in a civil proceeding, and the individual's right not to testify in a criminal investigation. When the government conducts a compulsory interview of an indefinitely detained naturalization applicant, without informing him that he is permanently, statutorily barred from qualifying for citizenship, or that the true import of the inquiry is that he is under criminal investigation, the balance between the government's civil power and the defendant's Fifth Amendment right is established in this Court's decision in *United States v. Kordel,* 397 U.S. 1 (1970).

Further, when the government imposes an interpreter upon a targeted individual during a naturalization interview, a due process right exists to a competent interpreter. Where the interpreter is incompetent, the standard for exclusion of evidence derived therefrom is not altered under the Rules of Evidence when an individual is charged with a false statements offense.

In this case, after a full evidentiary hearing, the district court concluded that the government overstepped the boundaries *Kordel* established, because the government engaged in fraud, deceit, and trickery when it misrepresented to the Petitioner that the purpose of asking him extensive questions about his

means of entry into the United States, conduct in Panama and Venezuela, and use of various aliases and passports was merely to "clarify the record." The court also found that the government's tactics were so grossly shocking and outrageous as to violate the universal sense of justice. As a result, the court dismissed the indictment. (App.94-95). The Fifth Circuit reinstated the indictment based upon what is in the Petitioner's view, a fundamental misreading of *Kordel*.

Additionally, after a thorough examination of tapes of the Petitioner's naturalization interview with the assistance of a certified court interpreter, the district court excluded the tapes, because the court found that the interpreter interpreting the questions during the interview was inherently incompetent and unreliable, and that the probative value of the interpretation was substantially outweighed by its prejudicial effect. (App.78-81). The Fifth Circuit reversed based upon what is in the Petitioner's view, a failure to recognize an individual's due process rights and a trial court's inherent duty as the gatekeeper of evidence to exclude incompetent, unreliable evidence whose prejudicial effect far exceeds its probative value.

A. Background

In March 2005, Posada entered the United States. In April 2005, the government commenced an investigation into the manner and means of his entry

into the country. (App.48-49, 1R-95, 3R-739, R-112:33).[1] Two months later on May 17, 2005, the United States Customs and Immigration Service (USCIS) took Posada into custody, and thereafter detained him. (App.49, R-60:28).

In August 2005, the government's disclosed confidential witness was released from a mental health hospital, and signed up as a documented FBI informant. At the time he signed up, his story changed regarding how Posada entered the United States, and, thereafter he received monetary compensation and special consideration regarding his immigration status. (App.50, R-60:56).

On September 27, 2005, the Immigration Court ordered Posada removed "to any other country, other than Cuba and Venezuela, willing to accept him." (App.5). The court granted deferral of removal to Cuba and Venezuela, because Posada would face a clear probability of torture in Cuba due to his long history of anti-Castro activities. Due to political ties between Cuba and Venezuela, the court found that there was a likelihood that Cuban agents would be allowed to torture Posada in Venezuela. But, since no other country was willing to accept him, Posada remained indefinitely detained in an immigration-law equivalent of limbo. (App.5).

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[1] References to "R" refer to the Fifth Circuit record on appeal.

Unaware of this investigation, on October 11, 2005, Posada filed an application for naturalization ("Form N-400") pursuant to section 329 of the Immigration and Naturalization Act based upon his honorable discharge from the United States military during a time of hostilities. (App.49-50).

On April 26 and 27, 2006, USCIS and the Department of Justice (DOJ) Department of Homeland Security (DHS) conducted an eight-hour immigration interview of Posada, who then was 78 years old. Five to six months before his scheduled interview, the adjudications officer, Susana Bolanos (Bolanos), received Posada's Alien File. She testified that when she first reviewed Posada's application, she determined that he was probably not eligible for naturalization due to his prior conviction for public endangerment in Panama, but scheduled an interview nonetheless.[2] (App.52-53, 56, 92).

Before the interview, the government provided Bolanos with evidence from two separate criminal

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[2] The district court did not find credible Bolanos' testimony that it was "standard practice" to interview all naturalization applicants, because the court's own experience as well as the immigration expert who testified showed that it was the standard practice where the interview took place not to interview an applicant if it is clear that he is unlikely to receive citizenship status. (App.57, 91 3R-771). Instead, the applicant would be taken into custody for removal. (App.57). The expert described aggravated felony convictions as the "kiss of death in immigration law," because they created a permanent, statutory bar to receiving immigration relief. (App.57).

investigations to formulate interview questions. One investigation involved a grand jury investigation into a bombing at a Cuban hotel. The second investigation stemmed from the execution of a search warrant in an unrelated case where a fraudulent Guatemalan passport was found in the name of "Manuel Enrique Castillo Lopez" bearing Posada's photograph and stamps indicating entry into Mexico in March 2005. (App.10, 49-50, 56-57).

One month prior to the interview, Bolanos met with "an unnamed attorney from the DOJ" and DHS attorneys to review and "discuss the flow" of the questions prepared for the interview. (App.52-53). During this pre-interview meeting, "everyone decided" that Posada should be instructed that if his attorney "respond[s] to questions directed to [him], or otherwise disrupt[s] the interview," that Bolanos could terminate the interview and his application would be treated as if he failed to appear for the interview. (App.56). Immigration regulations provide that failure to appear can be used as a basis to deny an application as abandoned. *See* 8 C.F.R. §§335.3, 335.6.

The interview began with the following oral statement read in English – which the district court observed that the interpreter failed to completely interpret: (App.66-67).

> This proceeding is being audio-visually recorded to ensure that a complete record is made.

Today's date is APRIL 26, 2006. The time is – .

This is the United States Department of Homeland Security, Citizenship and Immigration Service. El Paso District Office. I am Adjudications Officer Susana Bolanos, with me to assist with this interview are Jo Ellen Ardinger and Nick Perry, DHS attorneys. A Spanish language interpreter, Luis Granados, is also present today to assist us in communicating when appropriate and necessary to ensure that I am able to obtain all the information required to fully adjudicate your application.

The case file number is A12 419 708. We will be beginning the initial examination on the Application for Naturalization, Form N-400, filed by Mr [sic] Luis Clemente Posada Carriles on October 12, 2005 with this agency. This application was filed under Section 329 of the Immigration and Nationality Act as amended.

We are conducting an administrative proceeding in reference to the aforementioned case to determine eligibility for the benefit sought.

Also present at this interview is your attorney of record: Maria Trina Burgos. Understand that your attorney's role at this interview is to ensure that your legal rights are protected. Your attorney cannot respond to questions directed to you, or otherwise disrupt the interview. If your attorney disrupts the interview, I may choose to terminate the

> interview. If the interview is terminated for this reason, your application will be treated as if you failed to appear for the interview.
>
> Do you understand what I just said? Do you have any questions at this time?
>
> This proceeding shall be conducted under oath. All statements you make constitute sworn testimony. Any statements you make today can and may be used for any purpose in any legal or administrative proceeding. If you don't know the answer to a question you are asked today, please don't guess but rather tell me you don't know the answer. If you don't understand any questions today, please stop me and tell me you don't understand so that the question can be repeated, rephrased, or clarified. If you feel a truthful answer to a question would tend to incriminate you, you can exercise your constitutional right against self-incrimination. If you lie or intentionally give misinformation, you may be subject to criminal or civil penalties or barred from immigration benefits, including naturalization. You are here voluntarily and you may choose to terminate this proceeding at any time. . . .

(App.54-56).

Throughout the interview when Posada or his counsel attempted to complain about the relevancy

and extensive scope of the inquiry,[3] inordinate length of the interview, questions beyond a one year period before his application, or exercise of his constitutional rights, they were continually threatened that those assertions could result in termination of the interview, and that failure to answer may result in the denial of his application. (App.71-72, 92, 94-95, DX3-Tape 1A at 368-369, 410-413, Tape 2A at 1118, Tape 2B at 1890, Tape 3A at 1126, 1160-1175).[4]

At no point during the interview was Posada or his counsel advised that he was under any criminal investigation. Nor were they advised that Bolanos had already determined that he probably was not eligible for any immigration benefits due to his pardoned convictions for aggravated felonies in Panama. (App.52-53). On August 24, 2006, USCIS issued its ruling using the pardoned foreign conviction to deny Posada's application, stating:

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[3] The immigration expert testified that illegal re-entry is not a crime of moral turpitude, does not effect one's moral character, and that normally, USCIS does not care how a naturalization applicant entered the country. He further explained that no portion of a naturalization application addresses one's means of entry into the country, and that how someone entered is not relevant to the determination of eligibility for naturalization. (App.58, 3R-745, R-112:153-154). He explained that use of an alias is not a crime of moral turpitude, and that an applicant does not need to respond to questions that have no bearing on moral character. (R-112:162-163).

[4] References to "DX" refer to the Petitioner/ Defendant's exhibits entered in the district court.

Section 329 does not exempt you from the requirement that a naturalization applicant show that he or she is a person of good moral character. An applicant is mandatorily barred from establishing good moral character if, at any time, he has been convicted of an aggravated felony. This ground for denial, discussed in turn, constitutes an independent and sufficient reason to deny your application.

* * *

USCIS finds that your conviction under Article 237 of the Panama Criminal Code constitutes an aggravated felony as a crime of violence under Section 101(a)(43)(F) of the Act.

* * *

Whether an offense is a crime of violence is a matter of statutory interpretation. The inquiry is made without regard to the particular facts of a case, but rather by looking to the elements and nature of the offense. As a result, whether a conviction under Article 237 of the PCC is a crime of violence turns on an examination of the statute of conviction.

The first prong of the crime of violence definition requires that the offense in question contain as an element the "use, attempted use, or threatened use of physical force against the person or property of another." Your conviction clearly falls under the first prong of 18 U.S.C. §16(a) because PCC Article 237

contains the element of an attempted use of force. Specifically, it requires an intent to attack national security and an intent to cause harm by means of explosive/toxic materials. Federal courts have generally found that even the mere possession of either a bomb or an unlawful weapon is a crime of violence when interpreting other provisions with the same or similar definition of a crime of violence. . . .

* * *

On August 25, 2004, you were granted a pardon per Executive Order No. 317 issued by the President of the Republic of Panama. For two separate reasons, the pardon does not eliminate the immigration effects of your Article 237 conviction and does preclude your ability to establish good moral character under INA §101(f)(8) and 8 C.F.R. §316.10(b)(1)(ii). First, *a pardon by the president of a foreign country does not qualify as a full and unconditional executive pardon as referred to in 8 C.F.R. §316.10(c)(2)(i). It has long been held that foreign pardons are ineffective in the removal context and USCIS finds that argument persuasive in the naturalization context. . . . [T]here is no indication in the regulation nor in its promulgation that pardons in the naturalization context are to be treated differently from the established rule that foreign pardons do not remove the immigration consequences of convictions.* Therefore, the USCIS finds that your pardon is not effective for immigration purposes.

(App.92, Fifth Cir. Supp. Rec. 1:4-6) (citations omitted, emphasis added).

Five months after USCIS denied Posada's naturalization application, and shortly before he was eligible for release pursuant to a habeas order issued in accordance with *Zadvydas v. Davis*, 533 U.S. 678 (2001), the government filed an indictment charging Posada with seven counts of making false statements in a naturalization proceeding.[5] (App.101, R-85-Ex. A).

B. Proceedings Below

Dismissal of Indictment

Asserting that the government engaged in fraud, trickery and deceit resulting in a denial of due process, Posada filed a motion to suppress any statements made during the interview and all evidence derived therefrom. After a full evidentiary hearing the court found that the evidence was overwhelming that the government "improperly manipulated the administration of criminal justice in order to secure a criminal

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[5] Posada was charged with one count of naturalization fraud and six counts of making false statements in a naturalization proceeding in violation of 18 U.S.C. §§1425(a), 1015(a). The allegedly false statements concerned the manner in which Posada entered the United States in March 2005. The allegedly false statement identified in the Form N-400 was that Posada failed to indicate that he used the alias "Manuel Enrique Castillo Lopez" in addition to two aliases he listed. (App.49, 101).

indictment(s)" against Posada, and concurred that the government engaged in fraud, deceit and trickery when it asserted during the interview that the extensive questioning was merely to "clarify the record." (App.91-92, 95). The court further found that the government's tactics were so grossly shocking and so outrageous as to violate the universal sense of justice, and required dismissal of the indictment. (App.91, 95).

The court found "completely disingenuous" the government's representation that "an applicant who has received a pardon is not precluded from demonstrating good moral character" and "that the naturalization interview was [not] in vain and [not] merely a pretext for a criminal investigation." (App.92). The multiple factors the court identified showing that the true purpose of the interview was to gather information for the on-going criminal investigations included:

- USCIS denied Posada's naturalization based upon his pardoned foreign conviction, and Bolanos' testimony that she determined before the interview that Posada probably was statutorily barred due to his foreign conviction. (App.52-53). Expert testimony showed that an aggravated felony conviction requires denial of immigration benefits. (App.57).

- Seven months before the interview, the government had collected extensive materials related to the criminal investigations. (App.6, 48-50, 52, 56-57).

- DOJ's involvement in the meeting one month prior to the interview to "review" and "discuss the flow" of questions, and discuss the warning. (App.52-53, 56). Also, documents DOJ provided to Bolanos were only available from the on-going criminal investigations and were used to develop some of the questions posed. (App.56-57).

- The "warnings" read at the beginning of the sworn interview were of little significance, because:

  (1) the interpreter failed to interpret the entire warning and the interpretation provided was not accurate, (App.66-67),

  (2) Posada was "continually threatened that exercise of Fifth Amendment rights might result in termination of the naturalization interview." When Posada's counsel attempted to advise him or question the scope or length of the interview, the government retorted that "this is just for the purposes of the record" or to "clarify the record" and that his failure to answer such questions may result in the denial of his application – thereby disguising the true

purpose of the questions, (App.71-72, 95), and

(3) "more importantly, [Posada] did not receive an explanation of the true import of the Government's inquiry." (App.81, 92, 95).

- The length of the interview, presence of two interviewers, an interpreter and two government attorneys, and the fact it was audio and video taped. (App.92-93).

The Fifth Circuit reversed, stating that the district court incorrectly decided the issues of law, holding:

(1) The effect of a foreign pardon upon a conviction for an aggravated felony in a naturalization proceeding was not entirely clear without conducting an interview. (App.28).

(2) All naturalization applicants must be interviewed before an application is denied based upon an aggravated felony that is a permanent, statutory bar. (App.34-35).

(3) *Kordel* does not apply where the government has the right to inquire about a subject matter. (App.26, 34-35).

(4) In order to show that the government engaged in outrageous conduct, like a defendant raising an entrapment defense, an accused charged with a false statement offense must show "government over

involvement combined with a passive role by [himself]" in uttering allegedly false statements. (App.36).

(5) The warning provided barred a Fifth Amendment due process challenge, despite the threats to deny immigration benefits if all questions asked were not answered or constitutional rights were asserted. (App.24).

Exclusion of Tapes & Transcripts

Posada also moved for exclusion of the tapes and transcripts of the interview due to, *inter alia*, the government-provided interpreter's inaccurate interpretation. Posada argued that the interpreter, who was not court certified, was incompetent in that he rendered inaccurate and incomplete translations of the questions posed and Posada's answers. After an extensive review of the tapes with the aid of a court certified interpreter, the district court ruled that the interpreter at the naturalization interview was incompetent, and that the incompetent interpretation prejudiced Posada. The court summarized its findings, stating:

> No effective communication existed between Defendant and the interviewers; they were, so-to-speak, "not on the same page." Bolanos, Ardinger, and Perry believed they were asking one question, while Defendant thought they were asking another. Even in cases where only one or two words were interpreted incorrectly, it completely changed the meaning and tenor of certain questions. In

> light of the fact that the indictment in this case is based upon statements made during the naturalization interview, this Court finds that the interpretation is so inaccurate as to render it unreliable as evidence of Defendant's actual statements.

(App.79).

The Fifth Circuit reversed, finding that the district court incorrectly decided issues of law, holding:

(1) When the USCIS provides an interpreter for a naturalization applicant, the applicant does not have a due process right to a competent interpreter – even where the statements made later serve as the basis for false statements indictment.[6] (App.37).

(2) When a defendant charged with a false statements offense moves to exclude a taped statement based upon the incompetency of the interpreter, the district court may not exclude the entire tape. Rather, like a motion to dismiss or for judgment of acquittal, the court may only examine and exclude the particular questions and answers charged in the

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[6] Although the opinion states that it declined to decide this issue, the Fifth Circuit's failure to recognize a due process right to a competent interpreter directly impacted its analysis of all issues before it. (App.37-38). *See, Haitian Refugee Center, Inc. v. Nelson,* 872 F.2d 1555 (11th Cir.1989), (due process requires INS offices to maintain competent interpreters), *aff'd, on other grounds, McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 479 (1991).

indictment under the narrow "fundamental ambiguity" standard. (App.39-43).

Posada filed a Petition for Rehearing *En Banc* on September 9, 2008, which was denied on September 24, 2008. (App.99-100).

REASONS FOR GRANTING THE PETITION

Review by this Court is necessary because the Fifth Circuit decided the following important questions of federal law:

First, the court of appeals' opinion conflicts with this Court's decision in *United States v. Kordel,* 397 U.S. 1 (1970), and significantly impacts upon the rights of individuals and the duties of the government in naturalization proceedings. Those rights and duties include: (i) whether the USCIS is required to conduct an interview of a naturalization applicant before denying citizenship where a permanent, statutory bar clearly appears on the face of the application and judgment of conviction, and (ii) whether the USCIS, when questioned about the extensive length and depth of a naturalization interview of an applicant who does not qualify for citizenship due to a permanent, statutory bar to a showing of good moral character, may disguise that the true purpose of the inquiry is to gather evidence for a criminal indictment by stating it is "just for the record," and compel answers by stating that refusal to answer will be considered as a basis to deny the application?

Second, the court of appeals' opinion renders a due process challenge asserting outrageous government conduct wholly inapplicable to any case involving false statements charges by requiring an accused to prove "a passive role by [himself]" as would be required for an entrapment defense. The court's reasoning makes it clear that such would be an impossible task under the due process clause unless the accused showed more than contemplated in *United States v. Russell*, 411 U.S. 423 (1973). The standards applicable to prove entrapment should not be bootstrapped to a due process claim to justify the type of misconduct this Court condemned in *Russell*.

Third, the court of appeals' opinion deprives an accused of his due process right to a fair trial by abrogating a trial court's inherent duty as the gatekeeper of reliable evidence under Rule 403 of the Federal Rules of Evidence in any false statements case by imposing a higher standard for exclusion of statements obtained through an incompetent interpreter. In accordance with this new standard, even where the trial court finds that a statement taken through the use of an incompetent interpreter is excludable because its probative value is far exceeded by its prejudicial effect, unless the entire statement also satisfies the narrow "fundamental ambiguity" exception previously only applied to dismiss false statement charges in the indictment or after conviction, such otherwise inadmissible evidence must be admitted for the jury's consideration.

I. The Fifth Circuit Has Decided an Important Federal Question that Conflicts with *United States v. Kordel* Because Its Decision Permits the Government to Conduct a Criminal Investigation through a Facially Ineligible Application for Immigration Benefits and Subject the Applicant to a Pretext Sworn Examination, Not Required under the Due Process Clause to Deny Immigration Benefits.

This Court has long denounced the practice of using civil enforcement powers to circumvent constitutional rights. *Abel v. United States*, 362 U.S. 217 (1960). It has admonished that the government's deliberate use of the administrative process "for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." *Id.* at 226. The district court here demonstrated that resistance when it dismissed the indictment.

Where an individual detained in immigration custody applies for naturalization to obtain release from custody and avoid removal from the United States is aware during an immigration interview that he is under criminal investigation, his choices are clear: (a) he may decline to testify and abandon his application, (b) he may assert his Fifth Amendment privilege which may be used to deny his application, (c) he may choose to seek the advise of counsel experienced in criminal law, (d) he may choose to withdraw his application, or (e) he may choose to testify,

knowing that the answers may be used in the criminal investigations.

However, when the government deliberately misleads an individual about the true purpose of an immigration interview, he cannot decide whether it is in his best interest to waive his Fifth Amendment right or assert it, seek qualified counsel or abandon his application seeking immigration benefits. Where, as here, the government deliberately misleads an individual about the true purpose of an immigration interview, through affirmative misstatements and threats to him and his immigration counsel, and then uses the coercive power of granting a naturalization interview to an individual held in immigration custody for two years who has been ordered removed (but with no country willing to take him), and by granting the interview creates some false hope that he might be eligible for citizenship, the government gains a tactical advantage by obtaining a target's sworn statement[7] that is otherwise not available.

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[7] The Petitioner does not suggest that a grand jury may not seek the sworn statement of an individual, because a grand jury subpoena, by its very nature, informs an individual that a criminal investigation is afoot, and often cites to the statute of the violation of law under investigation. Additionally, unlike an individual subpoenaed before a grand jury, an immigration applicant is free to terminate an interview or withdraw his application. *See*, 8 C.F.R. §§334.18, 335.6, 335.7, 335.10. Further, all applicants must be interviewed before immigration benefits can be granted, but are *not* required to submit to an interview before they can withdraw their application, terminate the

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A. *Kordel* affirms that the deliberate use of the civil process to circumvent Fifth Amendment Rights to obtain evidence for a criminal prosecution violates due process.

It is a well-settled rule that the government may conduct simultaneous civil and criminal proceedings without violating the due process clause or departing from proper standards in the administration of justice. *United States v. Kordel*, 397 U.S. 1, 11-12 (1970). But the government may not use the civil proceeding to circumvent Fifth Amendment protections or otherwise act in bad faith.

In *Kordel,* this Court recognized the boundary between proper and improper uses of parallel proceedings. The government crosses the line and violates a defendant's rights where:

> the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . [or] any

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interview, or if the USCIS denies an application due to a statutory bar. *See*, 8 C.F.R. §335.10 and pp. 27-30, *infra*. Unlike testimony compelled pursuant to a formal request for a grant of immunity in a court or congressional proceeding or before a grand jury under 18 U.S.C. §6003, *et seq.*, USCIS has no right to compel the applicant's appearance or testimony in order to process a naturalization application, but may deny the application based on the applicant's failure to appear. 8 C.F.R. §§334.18(b), 335.6, 335.7.

> other special circumstances . . . might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Id. (App.19-20).

In *Kordel*, the FDA, while conducting an investigation into possible violations of the Food, Drug and Cosmetic Act by a corporation and its officers, initiated a civil investigation and lawsuit seeking to seize some of the corporation's products. *Kordel,* 397 U.S. at 3. In connection with the suit, the FDA also filed extensive interrogatories. Before *Kordel* responded, the FDA notified the company that the agency was contemplating a criminal proceeding against it concerning the same allegations. *Id.* at 4. Defendants moved to stay the civil proceedings or extend the time to answer the interrogatories until any criminal proceeding was concluded. The court denied the motion. The FDA thereafter formally recommended criminal proceedings to the General Counsel. After the company answered the interrogatories, the DOJ followed a recommendation by the Department of Health, Education and Welfare to institute a criminal proceeding. The government later obtained criminal misbranding convictions against two corporate officers. *Id.* at 6. On a grant of certiorari to consider the government's questions concerning the invocation of simultaneous civil and criminal proceedings, the officers of *Kordel* argued that the government used the civil discovery process to compel answers to interrogatories to build the DOJ's parallel criminal case and that such use "reflected such unfairness and

want of consideration for justice as . . . to require reversal." *Id.* at 11. This Court noted that the officer answered the interrogatories after being told of a contemplated criminal action against him. *Id.* at 7. This Court thus found no violation of due process, explaining that it would "stultify enforcement of federal law to require a governmental agency . . . to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.*

At the same time, this Court recognized specific examples of bad faith conduct in parallel investigations that evidence a due process violation for "fail[ing] to advise the defendant in its civil proceeding that it *contemplates* his criminal prosecution." *Kordel*, 397 U.S. at 12 (emphasis added). This Court cited two instructive examples in which the government misused civil investigations for criminal purposes. *Id.* at n.24.

First, the Court referenced *United States v. Lipshitz*, 132 F.Supp. 519 (E.D.N.Y. 1955), in which separate civil and criminal IRS investigations improperly merged when the civil agent met with the special (criminal) agent at least five times and the criminal agent instructed the civil agent about obtaining evidence. The court found that the two "were jointly engaged in the preparation of the case for the criminal prosecution of the defendant, and that they did not inform him. . . ." *Id.* at 523. The district court suppressed the evidence, concluding that to obtain

information for a criminal prosecution without the defendant's knowledge is the equivalent of obtaining the information by "stealth or subterfuge." *Id.*

Second, this Court cited *United States v. Guerrina*, 112 F.Supp. 126 (E.D. Pa. 1953), in which the defendant believed that the agent was examining his books and papers to establish his civil liability when in fact the agent was participating "to obtain evidence for [a] *contemplated* criminal prosecution." *Id.* at 130 (emphasis added). The district court thus held:

> the defendant's constitutional rights were violated in that he was induced under a misapprehension of the true facts and circumstances to give his consent to an examination. . . . His rights were further violated in that he was induced by reason of the same misunderstanding of the true facts and circumstances to give testimony against himself without proper warning.

Id. at 130-31.[8] The district court concluded that the "subterfuge employed by the agents negatived his consent and rendered his action involuntary." *Id.* at 131. The court reasoned that such conduct, if

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[8] The district court here relied upon *Guerrina* (App.86, 93) as well as *United States v. Blocker*, 104 F.3d 720 (5th Cir.1997); *United States v. Tweel*, 550 F.2d 297 (5th Cir.1977); *United States v. Scrushy*, 366 F.Supp.2d 1134 (N.D. Ala. 2005); *United States v. Teyibo*, 877 F.Supp. 846 (S.D.N.Y. 1995); *United States v. Parrott*, 248 F.Supp. 196 (D.D.C. 1965); *SEC v. ESM Govt. Securities, Inc.*, 645 F.2d 310 (5th Cir.1981). (App.82-83, 85, 87-88, 93-94).

tolerated, would encourage the government to employ stratagems to trick defendants into waiving their rights:

> To permit evidence to be obtained against a defendant by the means here employed (however innocently it may have been done in this case) would be to encourage overzealous and less scrupulous officers and agents of law enforcement agencies to chip away rights guaranteed by the Constitution to defendants by trick and artifice, to do what could not be done in court proceedings, i.e., compel a defendant to testify against himself. *Id.* at 130.[9]

This Court spoke loudly when it cited *Lipshitz* and *Guerrina* with approval in *Kordel*. Those cases demonstrate that the government runs afoul of due process protections by failing to advise the defendant that it contemplates his criminal prosecution so that it can use the civil process to gather evidence prohibited by the limits of criminal discovery and the Fifth Amendment. This case falls squarely within the bad faith scenarios contemplated by *Kordel* and differs from *Lipshitz* and *Guerrina* only in that the conduct here was *more* egregious.

Here, the criminal investigations commenced approximately one year before the immigration interview of Posada. And, seven months before the April 2006 interview, the evidence upon which the

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[9] *See* n.5, *supra*.

interview questions supporting the false statement charges were framed was learned. (App.6, 48-50, 52, 56-57). In addition, the government's criminal investigative arm not only participated in reviewing "the flow" of the questions, warnings and threats to be administered, but also provided USCIS interviewer, Bolanos, with key pieces of evidence from the criminal investigation that were not in the public domain. (App.52-53, 56-57).

Further, the basis upon which the naturalization application was denied was available and known to the government as early as his removal proceedings – for which he was detained on May 17, 2005 and ordered removed on September 27, 2005. (App.5-6, 48-50, 52, 56-57). That basis was also evident on the face of the immigration naturalization application. Specifically, the existence of Posada's pardoned foreign aggravated felonies was well known from the face of his naturalization application, the government's files and international news. As Bolanos explained during the evidentiary hearing, when she first reviewed Posada's application, she determined that he probably was not eligible for naturalization due to his prior conviction for public endangerment in Panama.[10] (App.52-53). And, the immigration expert's

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[10] Although immigration officials are given some discretion in determining whether to count certain minor criminal offenses as evidence of lack of good moral character under 8 C.F.R. §316.10(b)(1)(ii), Congress provided that "an applicant *shall* be found to lack good moral character if the applicant has been . . . convicted of an aggravated felony as defined in section 101(a)(43) [codified as 8 U.S.C. §101(a)(43)] on or after November

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testimony confirmed that an aggravated felony requires denial of any immigration benefits, because the applicant is statutorily and permanently barred from showing good moral character.[11] (App.57-58). Further, the USCIS Adjudicator's Field Manual unequivocally provides that:

> For naturalization purposes, an applicant convicted of an aggravated felony on or after November 29, 1990, regardless of when the crime was committed, is permanently precluded from establishing good moral character. Accordingly, an application for naturalization filed by an individual convicted of an aggravated felony on or after November 29, 1990, *must* be denied. Moreover, the case should be considered for possible initiation of removal proceedings because an individual convicted of an aggravated felony at anytime is removable. See section 237(a)(2)(A)(iii) of the Act.

INS Adj. Field Manual 73.6(d)(1) (emphasis added).

Additionally, because the determination of whether an aggravated felony constitutes a permanent, statutory bar may only be determined from the documents of conviction, examining any information regarding the underlying activities that gave rise to

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29, 1990." Here, it is undisputed that Posada's Panamanian conviction was an aggravated felony under section 101(a)(43).

[11] *Garrido-Morato v. Gonzalez*, 485 F.3d 319, 321 (5th Cir.2007) (8 U.S.C. §1229(b) prohibits an alien from having any aggravated felony conviction).

those charges was improper, unnecessary and clearly irrelevant. *See, Shepard v. United States*, 544 U.S. 13, 16 (2005); *Patel v. Mukasey*, 526 F.3d 800 (5th Cir.2008) (noted Immigration Judge and Board of Immigration Appeals erred in looking into the facts of the case), App.92, Fifth Cir. Supp. Rec. 4-6, and p. 13, *supra*.[12] In *Patel*, the Fifth Circuit explained that it "employs a categorical approach to determine whether an offense necessarily entails fraud or deceit." And, that "[u]nder this approach, 'we refer only to the statutory definition of the crime for which the alien was convicted (rather than attempt to reconstruct the concrete facts of the actual criminal offense) and ask whether that legislatively-defined offense necessarily fits within the INA definition of an aggravated felony.'" *Patel*, 526 F.3d at 802. Accordingly, whether an offense is an aggravated felony under the INA, is a purely legal question that does not involve any examination of the underlying facts.

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[12] *See also, Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (examined whether State statute was a crime of violence for immigration purposes), *citing, Bailey v. United States*, 516 U.S. 137, 144 (1995) (examined elements necessary for federal firearms offense); *United States v. Jennings*, 195 F.3d 795, 797 (5th Cir.1999) (examined offense of possession of unregistered pipe bomb for sentencing purposes, holding "whether a crime constitutes a "crime of violence" is a matter of statutory interpretation"), *citing, United States v. Credit*, 95 F.3d 362, 364 (5th Cir.1996).

Similarly, the issue of whether a foreign pardon had the same legal effect as it did in a removal proceeding is a pure legal question that did not require an interview, or an examination of any documents. (App.42, Fifth Cir. Supp. Rec. 4-6, and p. 14, *supra*).[13] The USCIS properly followed this approach when it issued its written findings, stating that there is no indication in naturalization regulations addressing pardon waivers (8 C.F.R. §316.10(b)(1)(ii)), "nor in its promulgation that pardons in a naturalization context are to be treated differently from the established rule that foreign pardons do not remove immigration consequences of convictions." *See*, Fifth Cir. Supp. Rec. 3-6 (USCIS cited *Mullen-Cofee v. INS*, 976 F.2d 1375 (11th Cir.1992); *Marino v. INS*, 537 F.2d 686 (2d Cir.1976); and *Matter of M-*, 8 I&N Dec. 453 (BIA 1959)). *Accord, In re: Azim*, 2007 WL 2588539 (BIA 2007) (unpubl.) and *Sohaiby v. Savoretti*, 195 F.2d 139, 140 (5th Cir.1952) (visa applicant denied admission; noted that "a domestic pardon will,

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[13] *See United States v. Jean Baptiste*, 395 F.3d 1190 (11th Cir.2005) (naturalized citizen collaterally estopped from challenging drug conviction in denaturalization proceedings where USCIS filed petition to revoke citizenship on ground that he was barred from establishing "good moral character" due to aggravated felony conviction); 8 U.S.C. §1227(a)(2)(A)(vi) (only a full and unconditional executive pardon by the President of the United States or the Governor of any of the several States may operate to remove a permanent, statutory bar to showing good moral character).

[but] a foreign pardon will not, prevent deportation").[14]

Moreover, the government engaged in overt fraud, trickery and deceit throughout the interview in order to disguise the true purpose of questioning Posada under oath. As the district court found after a full evidentiary hearing, there was overwhelming evidence that the interview was pretextual, and that the government's argument "that its only purpose in holding the naturalization interview was to determine his good moral character [was] completely disingenuous." (App.92). The court found that Posada was "continually threatened that exercise of Fifth Amendment rights might result in termination of the naturalization interview." (App.94). When Posada's counsel attempted to advise him or question the scope or length of the interview, or when Posada attempted to limit his answers to a one year period, the government retorted that "this is just for the purpose of the record" or to "clarify the record," and that Posada's

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[14] *See also*, R. DIVINE, *Immigration Practice*, 2006-2007 Ed. §10-6(b)(2)(ii) (2007): Foreign Convictions, ("foreign pardon or expungement does not remove a conviction's immigration consequences [unlike U.S. pardons] for certain enumerated grounds."); M. KRAMER, *Immigration Consequences of Criminal Activity* at 43-45 (2003) (BIA determines if a foreign disposition is a conviction by referring to the U.S. equivalent crime. However, it is not necessary that a foreign jurisdiction's procedures comport with American standards of due process or constitutionality).

failure to answer such questions may result in the denial of his application. (App.71-72, 95).

Unlike the investigations in *Kordel, Lipshitz* and *Guerrina,* there was no *bona fide* purpose for conducting an immigration interview of Posada in order to adjudicate his naturalization application. No interview was necessary or required before an adjudication could be entered based upon the unequivocal facts in the government's possession before the interview commenced. Thus, the interview served the sole purpose of furthering the criminal investigation – a purpose this Court rejected in *Abel* and *Kordel.*[15]

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[15] Unlike a hearing seeking appellate review of an adjudicator's findings, a naturalization interview is not a due process right, nor is it required in order to deny immigration benefits for an applicant who is clearly not statutorily qualified. An interview is a burden placed upon the applicant if USCIS grants an interview. The relevant language provides:

> Subsequent to the filing of an application for naturalization, *each applicant shall appear* in person for a Service officer designated to conduct examinations pursuant to §332.1 of this chapter.

8 C.F.R. §335.2(a) (emphasis added). In contrast, 8 C.F.R, §335.1 only requires USCIS to conduct an *investigation.* Nothing in that section requires USCIS to grant an *interview* of the applicant if clear statutory grounds exist to deny citizenship. Specifically, 8 C.F.R. §335.1 provides:

> Subsequent to the filing of an application for naturalization, *the Service shall conduct an investigation* of the applicant. *The investigation shall consist, at a minimum,* of a review of all pertinent records, police department checks, and a neighborhood investigation in the vicinities where the applicant has resided and

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B. The Fifth Circuit decision hollows out the *Kordel* rule and allows the government to misrepresent the true nature of its investigation.

Kordel directs that the failure to advise the defendant in the civil proceeding that the government specifically contemplates *his* criminal prosecution is bad faith. The Fifth Circuit, however, disregards as inconsequential and merely collateral, facts that were central to the district court's finding that the government engaged in deceit, trickery or intentional misrepresentation to conceal the true nature of the investigation. (App.24-25) (*citing*, *United States v. Tweel*, 550 F.2d 297, 300 (5th Cir.1977)). The Fifth Circuit, skirting these facts, held that there was no bad faith deception because the government "*did* warn Posada" at the beginning of the interview that, among other things, he could exercise his right against self-incrimination, and that if he lied, he may be subject to criminal or civil penalties or barred from immigration benefits. (App.25, 55).

> has been employed, or engaged in business, for at least the five years immediately preceding the filing of the application. The district director may waive the neighborhood investigation of the applicant provided for in this paragraph.

Id. at §335.1 (emphasis added). Notably absent from the regulation is any requirement that USCIS *must* conduct an *interview*. And, no court has ever ruled that the USCIS must interview an individual who is statutorily barred from obtaining citizenship before denying an application, and/or transferring the alien for removal proceedings.

However, this singular warning was combined with a threat that any disruptions by his counsel could result in termination of the interview, and hence, denial of his application for citizenship. Also, it was followed by continual threats that "exercise of Fifth Amendment rights," or failure to answer or limiting the scope of his answers would result in denial of his application. Moreover, when Posada or his counsel challenged the length of the interview, or scope and relevance of any inquiry, the response was that it was only for the purpose of "clarifying the record." (App.71-72, 95). Such threats, combined with the material misrepresentations that the government's need to interview Posada was for the purposes of clarifying the record, rendered the singular warning – even assuming it was fully and accurately interpreted – of no effect.

Hence, the Fifth Circuit's decision is at odds with this Court's precedent because *Kordel* implicitly recognizes that government trickery or deception in the context of an ostensibly civil investigation will negate an otherwise valid waiver of the right against self-incrimination. *Kordel* cites with approval to *United States v. Thayer*, 214 F.Supp. 929 (D. Colo. 1963), at footnote 23. In *Thayer*, as here, the SEC did not tell the defendant that the government was actively investigating him for criminal wrongdoing when he provided information in an ostensibly civil investigation. *Thayer* concluded that warnings are ineffective when the defendant is unaware that the investigators are focusing on his conduct. It reasoned,

"the giving of the warning cannot have much significance where the defendant was, so to speak, then within the sights of government and did not receive an explanation of the true import of the . . . inquiry." *Thayer*, 211 F.Supp. at 933. Further, "[a] warning in such circumstances could not be effectual unless it includes a full disclosure to the effect that a perjury charge is then being contemplated and is almost sure to follow if the defendant persists in the answers which he has been giving." *Id.* at 932, and App.94. Thus, in the context of parallel investigations, government bad faith through deliberate subterfuge to circumvent constitutional rights excuses a defendant from invoking his right against self-incrimination, refusing to answer or failing to terminate such interviews. Similarly, in *United States v. Guerrina*, 112 F.Supp. 126 (E.D. Pa. 1953), the district court concluded that the "subterfuge employed by the agents negatived his consent and rendered his action involuntary." *Id.* at 131.

Thus, a perfunctory, boilerplate warning does not cure government subterfuge, deception and misrepresentation. Here, the warning Posada received did not negate the government's deception, because it was coupled with threats and materially misleading responses regarding the true import of the government's inquiry. Further, the warning did not provide fair notice because it speaks only to the *possibility* that his statements would be used against him, when it was clear that there was no other purpose for taking the statement of an immigration applicant

whose aggravated felony conviction statutorily barred him from receiving any immigration benefits, permanently. Unlike the defendant in *Kordel* who knew that the government "contemplated criminal action against him" when he answered the interrogatories, Posada was not aware of the on-going investigations. Moreover, the government deceived Posada with false statements, posturing and trickery to believe that he was receiving a *bona fide* interview, and thereafter compelled him to respond to questions with threats that his failure to do so would be used against him in adjudicating his naturalization application, when in fact, it was clear – from the face of his naturalization application, the judgment of conviction in Panama, or his prior removal proceedings – that he was legally barred from qualifying for citizenship.

II. The Fifth Circuit Has Decided an Important Federal Question that Conflicts with *United States v. Russell*, Because it Requires an Accused Who Raises a Due Process Violation Alleging that the Government Engaged in Outrageous Conduct in Obtaining a Statement or Evidence to Support a False Statement Offense to Additionally Prove that He Had a "Passive Role" in Any Act or Statement that Served as the Basis for the Charged Offense.

Entrapment and its related due process defense, outrageous government conduct, are based on the notion that it "serves no justifying social objective" for

the government to "creat[e] new crime for the sake of bringing charges against a person [it] had persuaded to participate in wrongdoing." *United States v. West,* 511 F.2d 1083, 1085 (3d Cir.1975). Despite their common intellectual origin, however, the two defenses are not identical and require distinct inquiries to apply properly. On the one hand, the defense of due process focuses exclusively on the conduct of the government. If that conduct is "so outrageous" as to be "shocking to the universal sense of justice," then the Due Process Clause can function as an "absolut[e] bar [on] the government from invoking judicial processes to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 431-32 (1973).

The defense of entrapment, on the other hand, focuses on the defendant himself: if the defendant was predisposed to commit the crime, then it cannot be said that the government is responsible, notwithstanding the egregiousness of its conduct. *Id.* at 432-36. In *Matthews v. United States,* 485 U.S. 58 (1988), this Court reiterated that it has consistently adhered to the view that a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. *Id.* at 63. *See, Russell,* at 435-36. Predisposition, "the principal element in the defense of entrapment," *id.* at 433, focuses upon whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime. *Sherman v. United States*, 356

U.S. 369, 372 (1958); *Russell,* at 436. The question of entrapment is generally one for the jury, rather than for the court. *Sherman*, at 377.

However, predisposition or a "passive role" is not a requirement for an accused to demonstrate that the government engaged in outrageous conduct in obtaining a false, or otherwise coerced, statement from him. *Russell,* at 431-32. In *Hampton v. United States*, 425 U.S. 484 (1976), Justice Powell, writing a concurring opinion for himself and Justice Blackmun, explained that the law did not preclude the notion that "fundamental fairness inherent in the guarantee of due process [might] prevent the conviction of a predisposed defendant." *Id.* at 492. Rather, he stated, the defense of "[e]ntrapment should now be employed as a term of art limited to [predisposition]," *id.* at 492 n.2, and that either a court's supervisory power or due process "could support a bar to conviction" where the defendant was predisposed, but the government's actions were nevertheless "outrageous" and violated fundamental fairness, *see id.* at 492-95 & n.6.

Thus, the Fifth Circuit's holding – ruling that in order to satisfy the showing of outrageous misconduct a defendant charged in a false statements offense must show that he played a "passive role" in the offense – directly conflicts with *Russell, Hampton* and *Matthews*.

III. The Fifth Circuit Decided an Important Federal Question that Conflicts with an Accused's Right to a Fair Trial in a False Statements Case Where the Statements Were Obtained Through an Incompetent Interpreter.

In order to secure an individual's right to a full and fair immigration hearing, due process requires that an interpreter used must be competent. *See, Amadou v. INS*, 226 F.3d 724, 727 (6th Cir.2000) (asylum); *Kotasz v. United States,* 31 F.3d 847, 850 n.2 (9th Cir.1994) (removal); *Perez-Lastor v. INS,* 208 F.3d 773 (9th Cir.2000) (deportation); and *Haitian Refugee Center,* 872 F.2d at 1562 (worker permit); *Augustin v. Sava*, 735 F.2d 32 (2d Cir.1984) (deportation). *But see, Abdullah v. INS,* 184 F.3d 158 (2d Cir.1999) (worker permit).

The district court, following the teachings of *Perez-Lastor*, meticulously examined the enhanced audio-recordings of Posada's immigration interview multiple times with the assistance of a court-certified interpreter and found that the interpreter translating the questions posed to Posada and his answers was incompetent and that "the interpretation is so inaccurate as to render it unreliable as evidence of Defendant's actual statements." (App.64-65, 79). The court further found that the incompetent interpretation prejudiced the outcome of Posada's proceeding and potentially affected the outcome of both his immigration proceedings and the criminal indictment below. (App.80). The court then ruled:

> the danger of prejudice resulting from the admission of the interpreted statements far outweighs any probative value they may have because the interpretation was so inherently unreliable. In the end, the statements at issue are not merely evidence of the crime, they are themselves the relevant crime in this case.

(App.80-81). As a result, the district court suppressed the tapes and transcript, concluding that "the testimony given at the April 2006 interview should not be considered as evidence in any future hearing because the poor interpretation casts doubt upon its accuracy. *See*, *Perez-Lastor*, 208 F.3d at 783." (App.80-81).

On appeal, the government recast the issue as one of fundamental or fatal ambiguity, a standard used to evaluate dismissal of the charges or insufficiency of the evidence. The Fifth Circuit, following *United States v. Bell,* 623 F.2d 1132 (5th Cir.1980), held that the defendant's understanding of the question is a matter for the jury to decide, and that the district court erred in excluding the tapes based upon a finding that the interpreter was incompetent. Rather, the Fifth Circuit, casting aside the district court's factual findings of undue prejudice, ruled that it failed to focus on the "crucial question and answer." (App.42).

Such a standard, however, impermissibly divests a trial court of its fundamental function as the gatekeeper of reliable evidence. And, the "exclusion of unreliable evidence is the principal objective of many

evidentiary rules." *United States v. Scheffer*, 523 U.S. 303, 309 (1998). Rule 403 of the Federal Rules of Evidence accomplishes this purpose by excluding relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed.R.Evid. 403. Exclusion of such unreliable evidence is crucial to protect an accused's Fifth and Sixth Amendments rights in false statements cases, because without the presence of a reliable and competent interpreter, an accused can never unring the bell or turn back time with the use of a competent interpreter in order to establish lack of intent or materiality, without being compelled to testify at trial. Here, the Fifth Circuit improperly truncated an accused's constitutional rights by ruling that the jury must receive evidence that the trial court has found to be incompetent, inherently unreliable and unduly prejudicial.

CONCLUSION

The Court should grant the petition of writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-50737

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

LUIS POSADA CARRILES

Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas

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(Filed Aug. 14, 2008)

Before KING, HIGGINBOTHAM and SOUTHWICK, Circuit Judges.

KING, Circuit Judge:

The United States appeals the dismissal of an indictment charging false statements in naturalization proceedings. The basis for this dismissal was the district court's findings that the government engaged in deceptive conduct and outrageous tactics during these naturalization proceedings. The United States also appeals the suppression of statements made by the defendant on the basis of incompetent translation

in the naturalization interview at which the statements were made. For the reasons that follow, we reverse the dismissal of the indictment, reverse the suppression of the statements made at the naturalization interview, and remand the case for further proceedings.

I. Facts and Proceedings

A. Factual Background

The defendant, Luis Posada Carriles, is a well known anti-Castro Cuban exile who has been associated with several major events in modern Latin American history. The events directly at issue in this case, Posada's entry into the United States and his subsequent attempt to become a naturalized American citizen, begin in 2005. In order to fully understand the issues swirling around Posada's naturalization application, though, it is necessary to go back much further, to the early 1960's and the aftermath of the Cuban Revolution.

Posada, a Cuban native, moved to the United States in 1960, the year after the fall of the Batista regime and Fidel Castro's rise to power. To say the least, Posada has never approved of the Castro regime; in his own pleadings in the district court, Posada is described as "unabashedly opposed to the domination of his native country of Cuba by the tyrannical dictator Fidel Castro and his brother Raul." In 1961, Posada became involved with the planning for the Bay of Pigs invasion and was

brought into contact with the CIA. He later enlisted in the United States Army, was commissioned a second lieutenant, and received special training at Fort Benning with other former members of the 2506th Cuban Brigade who had been commissioned in the United States Armed Forces. Posada was honorably discharged from the Army in March 1964. Unclassified documents contained in the record indicate that from 1965 until 1974 he operated as a paid CIA asset, although Posada asserts that he maintained a relationship with the CIA well into the 1980's.

Posada went to work for the Venezuelan secret police in 1967 and eventually became the head of a security division in charge of surveillance, VIP protection, weapons, and explosives. In this capacity, he directed counter-insurgency operations against leftist guerillas supported by Castro. Posada was later arrested by Venezuelan authorities in connection with the 1976 bombing of a Cubana Aerolineas aircraft in which all 73 people aboard were killed. After several years, he escaped from prison while still awaiting trial. Venezuela still seeks extradition; Posada, for his part, denies any involvement and claims that the charges were orchestrated by Castro.

After his escape from Venezuelan prison, Posada made his way to El Salvador. There he became involved in supplying arms and materiel to aid the U.S.-backed Contras fighting against the Sandinistas in Nicaragua, an operation that came to light as part of the Iran-Contra affair.

Posada moved to Guatemala in 1989 and was employed in security by the state telephone company. In 1990, he was shot several times in the face and torso during an assassination attempt allegedly carried out by Cuban agents. Throughout the 1990's he lived under assumed names in various Central American countries. When a series of hotel and tourist-site bombings occurred in Havana in 1997, Posada was suspected of involvement. The following year, he was the subject of two front-page articles in the *New York Times* in which he claimed a coordinating role in planning and executing the bombings. Posada later asserted, however, that his statements had been misunderstood and distorted by the reporter who interviewed him.

In 2000, Posada was arrested in Panama in connection with an attempt to assassinate Fidel Castro at a summit meeting in that country. He was detained for several years and ultimately convicted of crimes against national security (a Panamanian offense related to the manufacture or acquisition of bomb-making materials[1]) and counterfeiting public records. The outgoing president of Panama pardoned Posada in August 2004.

Posada entered the United States illegally some time in March 2005. He filed an asylum application and was scheduled to attend an interview with

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[1] This charge is referred to in the record by several other names, including "public endangerment."

immigration officials on May 17, 2005, but, on that day, he cancelled the interview, withdrew his asylum application, and held a press conference announcing his presence in Miami. Immigration officials took Posada into custody later that afternoon, and a few days later, on May 21, 2005, he submitted to an interview. Posada was ultimately placed in removal proceedings and, on September 27, 2005, ordered removed "to any country, other than Cuba and Venezuela, willing to accept him." The immigration judge found that due to his history of anti-Castro activities, Posada would face a clear probability of torture if deported to Cuba or Venezuela. But since no other country was willing to accept him, Posada remained detained in an immigration-law equivalent of limbo. On October 12, 2005, Posada filed an application for naturalization with United States Citizenship and Immigration Services ("USCIS"). This application and the related naturalization proceedings – which ultimately formed the basis for Posada's indictment on false statement charges – are discussed in greater detail below.

Meanwhile, at some point the government opened an investigation into the nature and manner of Posada's entry into the United States in March 2005. Posada maintained that he had entered the United States by land through Mexico with the assistance of a coyote (this was apparently the story that he told immigration officials at the May 21, 2005, interview), but media reports as well as public statements by Castro indicated that he had actually

entered by sea into Miami aboard the vessel *Santrina*. There were reasons to suspect that this in fact represented the truth. The *Santrina* was owned by the Caribe Foundation, and on November 15, 2005, federal agents conducting an unrelated search of that organization's Miami offices discovered a Guatemalan passport bearing Posada's picture issued in the name of "Manuel Enrique Castillo Lopez." This passport indicated that "Castillo Lopez" had traveled from Guatemala to the Mexican province of Quitana Roo, in which the city of Cancun is located, in March 2005. Documents provided by the government of Mexico revealed that the *Santrina* had run aground at Isla Mujeres, an island off the coast of Cancun, on March 15, 2005. There were also reports that Posada had been on Isla Mujeres around this time.

B. Naturalization Proceedings

Posada initiated the naturalization proceedings at issue in this case by filing a Form N-400 application for naturalization. The basis for application was his service in the U.S. armed forces during a period of military hostilities and his honorable discharge. *See* 8 U.S.C. § 1440.

The Form N-400, although obviously adapted to its stated purpose as a naturalization application, is a form of the type familiar to anybody who has ever applied for a government job or sought a government benefit. The form first requires the applicant to provide basic biographical information, e.g., full legal

name as well any other names used, address, social security number, date and place of birth, nationality, marriage and family status, employment history, military service, and selective service registration. It also contains a variety of questions relevant to the issue of citizenship and the applicant's moral character. Among other things, the applicant is asked if he has ever: been a member of the Communist Party, any other totalitarian organization, or a terrorist organization; advocated the overthrow of any government by force or violence; been associated with the Nazi government of Germany; been arrested, cited, or detained by any law enforcement officer; been convicted of a crime; committed a crime for which he was not arrested; been a habitual drunkard or prostitute; sold or smuggled illegal drugs; helped anyone enter or try to enter the United States illegally; given false or misleading information while applying for an immigration benefit or to prevent deportation; or lied to any U.S. government official to gain entry or admission into the United States. The applicant is also asked whether he supports the Constitution and form of government of the United States and is willing to take the Oath of Allegiance.

The last page of the Form N-400 instructs the applicant to certify under penalty of perjury that the application is true and correct. There is also a declaration required of the individual (if any) who prepared the application for the applicant (Posada's application was prepared by an attorney). Finally, there is an additional part of the application that the

applicant is instructed not to complete until told to do so by an INS (now USCIS) officer. Under the heading "Signature at Interview," the applicant is required to swear before an immigration officer that the contents of the application, including any corrections made at the interview, are true and correct. Below are spaces for the signatures of both the applicant and the officer.

Immigration regulations govern the scope of the naturalization proceedings after a Form N-400 is filed. These regulations require that USCIS conduct an investigation of the applicant that consists, at a minimum, of a review of "all pertinent records [and] police department checks." 8 C.F.R. § 335.1. The regulations also provide for an interview at which the applicant is to be questioned under oath: "[s]ubsequent to the filing of an application for naturalization, each applicant shall appear in person before a Service officer designated to conduct examinations. . . ." *Id.* § 335.2(a). At the interview, the examining officer is to correct the applicant's written application so far as necessary to conform with the answers given in person by the applicant; at the end of the interview the applicant then must swear to the truth of the application, including any corrections made at the interview, and sign the last page of the Form N-400 in the presence of the examiner. *Id.* § 335.2(c), (e).

Posada's naturalization application was assigned for investigation to Susana Bolanos, an adjudications officer with USCIS who specializes in cases that may involve national security or immigration fraud.

Bolanos traveled from her station in Washington, D.C., to El Paso, where Posada was detained, to conduct Posada's naturalization interview on April 26 and 27, 2006. Also present at this interview were an attorney from the Department of Homeland Security, an attorney from the Department of Justice's Office of Immigration Litigation, Posada's two attorneys, and a Spanish-language interpreter provided by the government.

At the beginning of the naturalization interview, Posada was informed in English and Spanish that: the proceeding would be conducted under oath; any statement could be used in any legal or administrative proceeding; lying or giving false information could subject him to criminal or civil penalties; he could exercise his right against self-incrimination if he thought that an answer would incriminate him; and he could terminate the interview at any time. The interview was conducted in a mixture of English and Spanish. At times questions would be put to Posada in English and translated into Spanish by the interpreter; Posada would then give answers in Spanish which would be translated into English by the interpreter. At other times, however, Posada simply listened to the questions in English and responded in English without the use of the interpreter.

Posada's naturalization interview lasted approximately eight hours over the course of two days. Among other things, Posada was asked about his history of anti-Castro activities, the 1997 Havana

bombings, two alleged plots to assassinate Castro, his activities with the Venezuelan secret police, his use of names other than his legal name, the Guatemalan passport bearing his picture issued in the name of "Manuel Enrique Castillo Lopez," his means of entry into the United States, the circumstances of his imprisonment in Venezuela and Panama, and any criminal acts for which he had not been arrested. Posada answered many of the questions but at times invoked the Fifth Amendment and refused to answer. In accordance with the regulations described above, corrections were made to Posada's Form N-400 to conform to Posada's responses during the course of the interview, and at the conclusion of the interview Posada initialed the portions of the application that were corrected and signed his name in the presence of Bolanos.

By letter of August 24, 2006, USCIS denied Posada's naturalization application.

C. Proceedings in the District Court

On January 11, 2007, a federal grand jury returned a seven-count indictment charging Posada with making false statements in connection with efforts to obtain naturalization. Posada was charged with one count of naturalization fraud (relating to false statements both on his written Form N-400 naturalization application and during the April 2006 naturalization interview) and six counts of making false statements in a naturalization proceeding (five

counts involving the naturalization interview and one count involving the Form N-400). The allegedly false statements identified in the naturalization interview were statements relating to Posada's entry into the United States in March 2005, specifically, that he had traveled into the United States over land through Mexico, that he had never been aboard the *Santrina* or seen four individuals who had been aboard it at the time, that he had never been in Cancun or Isla Mujeres, and that he never had a Guatemalan passport. The allegedly false statement identified in the Form N-400 was Posada's representation that the only two names he had used other than his own were "Ramon Medina" and "Franco Rodriguez"; it was the government's contention that Posada had also used the name on the Guatemalan passport, "Manuel Enrique Castillo Lopez."

· The case was scheduled for jury selection and trial on May 11, 2007. Less than two weeks before that date, on April 30, 2007, Posada filed a motion to suppress any statements made during the naturalization interview, as well as any notes, tapes, or documents containing the statements, based on the government's failure to warn Posada of the existence of a criminal investigation. The thrust of Posada's argument in this motion was that the government had improperly used the naturalization interview for the purpose of gathering information or statements from him to serve as the basis for an indictment. Posada maintained that the government had been assembling a criminal case against him since April

2005, and yet did not warn him or his attorneys that he was the subject of any investigation at the time of the naturalization interview. Posada asserted that though it was clear (according to him) that he did not qualify for naturalization due to his prior foreign convictions in Panama, the government conducted the interview anyway, "not to gather information regarding his eligibility for naturalization . . . , but to obtain allegedly false statements to indict a 79 year old man who could no longer be indefinitely obtained in immigration custody. . . ."

In a second motion filed on April 30, 2007, Posada urged the district court to exclude as evidence the tapes and transcript of the naturalization interview due to: (1) the poor quality of the tapes; (2) inaccurate translation during the interview by the government-provided interpreter; and (3) inaccurate transcription and translation of the tapes. In this motion, Posada argued that the tapes contained an excessive amount of inaudible portions, that the interpreter rendered inaccurate and incomplete translations of the questions posed to Posada, and that the translators who produced the transcript of the interview were not court certified or otherwise qualified. The district court, finding it necessary to conduct an *in camera* inspection of the interview tapes, entered an order on May 1, 2007, requiring the government to produce the tapes by noon on the following day. The government produced the tapes and also filed responses to Posada's motions on May

2, 2007. Two days later, on May 4, 2007, the district court held a pre-trial hearing on all pending motions.

Susanna Bolanos, the adjudications officer who had interviewed Posada, testified at this hearing. She explained that upon being assigned Posada's application, she had reviewed his Form N-400 and quite-extensive "Alien File," and also performed her own research on the Internet. She testified that when she first reviewed Posada's application and other available materials, "it seemed . . . that he might not be eligible" for naturalization, but that she scheduled an interview anyway. She explained that it was standard practice to schedule an interview, and that an interview would be scheduled even though an applicant may appear to be ineligible in order to allow the applicant to clarify any issues in the application and because applicants are entitled to an interview.

Bolanos further testified that while preparing for Posada's interview, she met with the two government attorneys who would be present at the interview, as well as an additional attorney from the Department of Justice. According to Bolanos, the purpose of this meeting, which occurred no more than a month before her trip to El Paso, was to review the questions, prepare for the interview, and make sure that the questions would "flow." She testified that nobody ever told her to ask any particular questions at the interview, and that all of the questions that she prepared were relevant to the eligibility requirements for naturalization.

Carlos Spector, an immigration lawyer, testified on Posada's behalf as an expert. Spector testified that: he had participated in around 700 naturalization interviews; having an aggravated felony conviction is the "capital death penalty" for an applicant seeking immigration relief such as naturalization because such a conviction acts as a statutory bar to naturalization; in his experience naturalization interviews typically last, at most, half an hour; and government lawyers had never been present at an interview that he had been to.

On May 8, 2007, the district court issued an order excluding the tapes and transcripts, suppressing the statements made at the interview, and further dismissing the indictment. After noting that it had thoroughly reviewed the enhanced digital copy of the tapes multiple times with the aid of a court-certified interpreter, the district court first found that the digital copy was inaudible at times, but that the inaudible portions were not so substantial as to render the digital copy untrustworthy. It next found inaccuracies in the transcript of the interview that made the transcript unreliable, although it noted that if the indictment were not dismissed, there would still be time for the government to submit a new version of the transcript before trial.

Taking up Posada's challenge to the translation services provided by the interpreter at the interview, the district court analogized to cases involving interpreters at deportation hearings and identified a two-part test from the Ninth Circuit asking whether the

interpretation was a competent one and, if not, whether the incompetent interpretation prejudiced the outcome of the proceeding. *See Perez-Lastor v. INS,* 208 F.3d 773 (9th Cir. 2000). Based upon a finding of "numerous instances where words were incorrectly interpreted or not interpreted at all, where [Posada] appeared to provide unresponsive answers as a result of his confusion over the questions, and where [Posada] expressed difficulty understanding what was said to him," the district court determined that the interpretation was incompetent. The district court also found prejudice, explaining that:

> No effective communication existed between [Posada] and the interviewers; they were, so-to-speak, "not on the same page." [The interviewers] believed they were asking one question, while [Posada] thought they were asking another. Even in cases where only one or two words were interpreted incorrectly, it completely changed the meaning and tenor of certain questions. . . . [T]he interpretation is so inaccurate as to render it unreliable as evidence of [Posada's] actual statements.

Accordingly, the district court held that Posada's testimony at the naturalization interview could not be considered as evidence in any future hearing. It also suppressed the tapes and transcripts as evidence.

Turning to Posada's motion to suppress the interview statements on the basis of the government's

failure to warn of the existence of a criminal investigation, the district court categorized the concern as one of due process. After reviewing a number of cases in which the government was alleged to have acted deceptively in using civil proceedings to obtain documents or statements for the purpose of a criminal investigation, the district court concluded that in Posada's case "the evidence [was] overwhelming that the Government improperly manipulated the administration of criminal justice in order to secure a criminal indictment(s) against [Posada]." The district court determined that "there was no genuine [naturalization] interview and the entire interview was, instead, a pretext for a criminal investigation," and further found that the government engaged in "fraud, deceit, and trickery" by misrepresenting to Posada the purpose of the questions at the interview. In addition, it found the government's tactics "grossly shocking and so outrageous as to violate the universal sense of justice." Stating that it was "left with no choice," the district court dismissed the indictment.

The government filed timely notice of appeal on June 5, 2007.

II. Standard of Review

The district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Guidry*, 456 F.3d 493, 501 (5th Cir. 2006). However, we review de novo the district court's interpretation of the law. *Id.*

The decision to dismiss an indictment on due process grounds is reviewed de novo, *United States v. Asibor,* 109 F.3d 1023, 1039 (5th Cir. 1997), although underlying findings of fact are reviewed for clear error, *United States v. Barrera-Moreno,* 951 F.2d 1089, 1091 (9th Cir. 1991).

III. Discussion

The government argues that the district court erred in: (1) suppressing Posada's statements at the naturalization interview based on a finding that incompetent translation services were provided by the interpreter; and (2) dismissing the indictment based on findings of deception and outrageous conduct on the part of the government. As the latter issue is potentially dispositive of this appeal, we address it first.

A. Dismissal of the Indictment

"[G]overnment misconduct does not mandate dismissal of an indictment unless it is so outrageous that it violates the principle of fundamental fairness under the due process clause of the Fifth Amendment." *Asibor,* 109 F.3d at 1039 (citation and internal quotation marks omitted). "Such a violation will only be found in the rarest circumstances." *Id.* (citation and internal quotation marks omitted). In dismissing the indictment in this case, the district court found that Posada's naturalization interview was not a genuine interview but instead was a pretext for a

criminal investigation, and, relatedly, that the government engaged in fraud, trickery, and deceit by misrepresenting the purpose of the questions at the interview to Posada. The district court further found the government's tactics "so grossly shocking and so outrageous as to violate the universal sense of justice."

As a preliminary matter, we agree with the government that the district court erred in dismissing the portions of the indictment charging Posada with making false statements on his Form N-400 naturalization application. The government conduct identified by the district court as the grounds for dismissing the indictment simply has no relevance to these alleged offenses, which were completed before USCIS began adjudicating Posada's application, and long before the interview itself. Moreover, after carefully reviewing the record in light of the relevant law, we further agree that the district court erred in dismissing the remaining portions of the indictment charging Posada with making false statements at the naturalization interview. As we explain, neither of the grounds put forward by the district court – grounds which we have loosely characterized as government deception and outrageous conduct – supports the drastic remedy of dismissal of the indictment. Before turning to the record, though, we first examine the relevant law.

1. General Principles

We begin with the well-settled rule that the government may conduct simultaneous civil and criminal proceedings without violating the due process clause or otherwise departing from proper standards in administering justice. *See United States v. Kordel,* 397 U.S. 1, 11-12 (1970). In *Kordel,* the FDA, in the course of an investigation into possible violations of the Food, Drug, and Cosmetic Act by a corporation and its officers, prompted the initiation of a civil suit seeking the seizure of some of the corporation's products. *Id.* at 3. The government later used information obtained in this civil proceeding to obtain criminal misbranding convictions against two of the corporation's officers.[2] *Id.* at 6. On appeal of these convictions, the Supreme Court rejected the officers' argument that the government's conduct "reflected such unfairness and want of consideration for justice" as to require reversal. *Id.* at 11. Finding no violation of due process, the Court explained that "[i]t would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.*

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[2] This point was apparently disputed by the government in *Kordel,* but for purposes of its opinion the Supreme Court assumed that the information aided the government in the criminal prosecution. *See Kordel,* 397 U.S. at 6 & n.6.

Notwithstanding this general approval of the practice of conducting parallel civil and criminal proceedings, the government's ability to do so is not wholly unrestrained. This much can be seen in *Kordel* itself, where the Court was careful to note what type of case was before it and, in so doing, make it clear that under some circumstances the government's use of parallel civil and criminal proceedings may be improper. As the Court explained, it did "not deal . . . with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel . . . ; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." *Id.* at 11-12.

Although the Supreme Court has not yet had occasion to re-visit these issues, our own precedents are instructive. In *United States v. Tweel,* 550 F.2d 297 (5th Cir. 1977), a case in which improper government conduct of the type alluded to in *Kordel* figured prominently, the IRS initiated a tax audit at the request of the Organized Crime and Racketeering Section of the Department of Justice as part of a criminal investigation that ultimately led to the taxpayer's conviction on various tax fraud charges. *Id.* at 298-99. When approached by the IRS revenue agent, the taxpayer's accountant asked whether a "special agent" – the type normally involved in criminal

investigations – was involved; the obvious implication of this question was that the accountant wanted to know whether the audit was criminal in nature. *Id.* at 298. The revenue agent's negative response led the accountant to believe that the audit was merely a civil one, and the taxpayer thereafter produced records for inspection. *Id.*

On appeal, the taxpayer argued that those records should have been suppressed at trial on the basis of government deception. After recognizing the general rule that "the mere failure . . . to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do[es] not constitute fraud, deceit and trickery[,]" we found that the agent's response to the accountant's question, though technically true, had been intentionally misleading, and that "the [revenue] agent's failure to apprise the [taxpayer] of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent . . . and a flagrant disregard for [the taxpayer's] rights." *Id.* at 299 (internal quotation marks and citation omitted). Accordingly, we held that the records obtained from the taxpayer should have been suppressed at trial. *Id.* at 300.

We have continued to rely upon the principles discussed in *Tweel* in resolving challenges to the propriety of dual investigations by civil and criminal branches of a government agency (or dual investigations by separate agencies). *See, e.g., United States v.*

Blocker, 104 F.3d 720, 729-30 (5th Cir. 1997) (affirming the denial of a motion to suppress where a state insurance examiner conducting an audit pursuant to a state administrative scheme had secretly agreed in advance to furnish any evidence of criminal activity to the FBI because the examiner did not exceed the scope of his authority under state law and there was no deception or misrepresentation about the scope or purpose of the audit); *United States v. Powell,* 835 F.2d 1095, 1099 (5th Cir. 1988) (same in a tax case where the civil audit was not initiated with criminal overtones but instead "grew" into a criminal investigation); *United States v. Caldwell,* 820 F.2d 1395, 1400 (5th Cir. 1987) (same in a tax case where evidence indicated that the civil audit was not requested as part of a clandestine criminal investigation); *see also SEC v. ESM Gov't Sec., Inc.,* 645 F.2d 310, 311-12, 317 (5th Cir. Unit B 1981) (holding that government deception is grounds for denying an administrative subpoena where an SEC investigator failed to disclose the existence of an investigation and instead obtained access to the company's records under the guise of obtaining "education" for himself).

These cases affirm that a government official may not make "material misrepresentations" about the nature of the investigation or inquiry, *Caldwell,* 820 F.2d at 1399 (emphasis removed), but show that the burden is on the subject of the investigation to prove that such misrepresentations were made, *see Blocker,* 104 F.3d at 729 & n.11; *Powell,* 835 F.2d at 1099; *Caldwell,* 820 F.2d at 1399. And they also

demonstrate that we have consistently adhered to the rule, discussed in *Tweel,* that the "mere failure" of a government official to warn that an investigation may result in criminal charges does not constitute fraud, deceit, or trickery. *See, e.g., Blocker,* 104 F.3d at 729 & n.11 (stating that there is no "affirmative duty to warn" and that the subject of investigation must show that he was intentionally misled); *Powell,* 835 F.2d at 1099 ("[R]evenue agents have no duty to inform taxpayers that the agents' investigations might result in criminal charges.").

2. Government Deception

The district court found that "there was no genuine [naturalization] interview and the entire interview was, instead, a pretext for a criminal investigation," and, relatedly, that the government engaged in fraud, trickery, and deceit by misrepresenting the purpose of the questions at the interview. The district court identified *Tweel* as the seminal case in this area, and we likewise find it a useful place to begin our analysis. Indeed, the decision in *Tweel* was grounded in considerations similar to those expressed by the district court in this case. As we have explained, the government's conduct in *Tweel* was objectionable because "there was *no* genuine civil audit of the kind represented; the only audit was a criminal audit specially ordered for [the] particular taxpayer, and falsely represented as a routine civil audit." *Blocker,* 104 F.3d at 729.

With regard to the district court's determination that the naturalization interview was merely a pretext for a criminal investigation, *Tweel* is distinguishable in at least two significant respects. First, in *Tweel* the revenue agent did not advise the taxpayer of his Fifth Amendment rights or warn that any information submitted by the taxpayer could be used in a criminal proceeding. *Tweel,* 550 F.2d at 299-300. As we recognized, though, this was consistent with the general rule that failing to warn that an investigation may result in criminal charges, absent affirmative misrepresentation, is not usually sufficient to constitute government deception. *Id.* at 299. Here, however, the government need not seek refuge in this rule because it *did* warn Posada (in the presence of Posada's lawyer) at the beginning of the interview that, among other things, he could exercise his right against self-incrimination if he thought that an answer would incriminate him, lying could subject him to criminal penalties, and any statement he gave could be used in any legal or administrative proceeding. We think faulty the district court's reasoning that these warnings "had little significance" because Posada "did not receive an explanation of the true import of the Government's inquiry."[3] As *Tweel* and

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[3] The district court additionally determined that the warnings "had little significance" as a result of the government's threats "that exercise of Fifth Amendment rights might result in termination of the naturalization interview." This reasoning is incorrect, however, because immigration officials may draw a negative inference from a naturalization applicant's silence. *See*

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subsequent cases make clear, while the government may not make affirmative material misrepresentations about the nature of its inquiry, it is under no general obligation of disclosure.

Second, whereas in *Tweel* the government approached the taxpayer and made misrepresentations that caused the taxpayer to participate in civil proceedings that were in fact undertaken entirely for the purpose of a criminal investigation, in this case it was Posada who, seeking to obtain an immigration benefit, approached the government and thereby initiated the civil proceedings at issue. The district court found this a distinction without a difference, but we disagree. Posada, not the government, triggered with his naturalization application a civil adjudicatory process

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INS v. Lopez-Mendoza, 468 U.S. 1032, 1043-44 (1984) ("'[T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak.'" (alterations in original) (quoting *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923))); *United States v. Alderete-Deras*, 743 F.2d 645, 647 (9th Cir. 1984) (stating that in the context of a deportation hearing an alien's "refusal to testify may form the basis of inferences against him in the deportation proceeding"). Our conclusion on this score is influenced by the fact that the burden of proof is on the applicant in a naturalization proceeding (which is a civil proceeding). *See* 8 C.F.R. § 316.2(b). The government did not act improperly in informing Posada, in accordance with this law, that his silence could be considered in adjudicating his application. Further, the fact that Posada nonetheless invoked the Fifth Amendment several times during the interview tends to undercut any argument that, for whatever reason, he felt unable to do so.

that, by regulation, calls for both an investigation of the applicant and an interview. *See* 8 C.F.R. § 335.2. It strikes us as highly incongruous, to say the least, for these proceedings to then be characterized as a sham engineered by the government. Nonetheless, because we think it at least possible that under some circumstances civil proceedings initiated by the non-government party may be rendered pretextual or otherwise tainted by government misrepresentations, we turn to an examination of the district court's specific findings.

In determining that the interview was a pretext for a criminal investigation, the district court relied upon: (1) the fact that Bolanos "had already determined that [Posada] was probably not eligible for citizenship but nonetheless chose to interview him"; (2) the fact that Posada's application was in part denied based on a determination that the pardon he received did not eliminate the immigration-law effects of his Panamanian conviction (which was the basis for Bolanos's initial determination that he might not be eligible); and (3) the "anomalous" aspects of the interview, including its length, the fact that it was taped, and the involvement of two interviewers, an interpreter, and four attorneys. Although we have no quarrel with these observations strictly as matters of fact (all are supported by the record), we think the district court misperceived their significance and, in so doing, erroneously found that the interview was merely a pretext for a criminal investigation.

First, although Bolanos did testify that when she initially reviewed Posada's application and the available materials "it seemed . . . that he might not be eligible" for naturalization, nothing in the record suggests that this preliminary determination in any way represented a final adjudication of Posada's application or otherwise obviated the need for an interview. As the government points out, it would be a harsh practice indeed to deny an interview to an applicant because a preliminary review of his application reveals that he *might* be ineligible. The regulations as well as the Form N-400 both seem to contemplate that, consistent with Bolanos's testimony, the very purpose of the interview, at least in part, is to give the applicant the opportunity to correct mistakes in the application and to clarify or respond to any issues that the examiner might have identified during the preliminary investigation.[4]

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[4] The parties dispute whether a naturalization application may ever be denied without conducting an interview. We need not decide this issue, although we do note that the regulations plainly state that "each applicant shall appear in person before a Service officer designated to conduct examinations. . . ." 8 C.F.R. § 335.2(a). It is enough for our purposes to observe that Posada's Form N-400 raised issues that required clarification and explanation before his application could be finally adjudicated, and that providing this clarification and explanation is precisely the point of the interview. For example, Posada explained in an addendum to his Form N-400 that he had been "arrested . . . in Panama under the charge of Collective Safety and Collective endangerment," and received a presidential pardon. However, he offered no explanation for why this charge was filed or what the offense of "Collective Safety and Collective endangerment"

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Second, the district court read too much into the fact that Posada's application was ultimately denied, in part, on the ground that the pardon received from the president of Panama was not effective to remove the immigration-law consequences of his conviction. As the denial letter from USCIS indicates, the effect to be given a foreign pardon in the context of naturalization proceedings was not entirely clear. The letter explains that foreign pardons had long been held ineffective in the *removal* context, but also notes that the regulatory language governing pardons in the naturalization context differs from the statutory provision governing pardons in the removal context.[5] Although USCIS ultimately determined that foreign pardons should be treated the same in the removal and naturalization contexts, the careful consideration USCIS gave this issue belies any notion that the naturalization proceedings were a sham.

Third, we agree with the government that the aspects of the naturalization interview identified as "anomalous" by the district court – its duration, the

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constitutes, information that would be necessary to determine whether the charge creates a statutory bar to naturalization.

[5] Indeed, this difference in language seems to cut in favor of the argument that pardons should be treated differently in naturalization proceedings. The removal statute specifically refers to a pardon "by the President of the United States or by the Governor of any of the several States," 8 U.S.C. § 1227(a)(2)(A)(vi), while the regulation governing pardons in the naturalization context makes no such distinction, *see* 8 C.F.R. § 316.10(c)(2).

presence of multiple attorneys and an interpreter, and the fact that it was taped – do not demonstrate that the interview was merely a pretext for a criminal investigation. We first note that several of the supposedly "anomalous" items are actually contemplated by immigration regulations, albeit as optional features of the interview. *See* 8 C.F.R. § 335.2(a) (applicant may request the presence of an attorney); § 335.2(c) (interview may be taped); § 335.2(f) (providing for use of interpreter). More to the point is the undeniable fact that, given his history and notoriety, Posada was a highly unusual applicant. There is simply no reason to expect his naturalization interview to approximate that of a "typical" applicant. Indeed, Bolanos, who specializes in cases that may involve fraud or national security, was apparently assigned to Posada's application precisely because he was an extraordinary applicant. To give just two examples, we would venture to guess that USCIS does not often receive applications from individuals who, like Posada, admit to having "advocated . . . the overthrow of [a] government by force or violence" and claim an affiliation with the CIA. But these matters were just the tip of the iceberg when it came to Posada's application, and it is thus entirely unsurprising that his naturalization interview was atypical in the ways identified by the district court.

More broadly, nothing in the record suggests that the naturalization interview was anything other than a bona fide examination conducted in accordance with the applicable regulations. The form of the interview

certainly conformed to those regulations. From the digital copy of the interview tapes it is apparent that at the beginning of the interview Posada was shown his Form N-400 and given the opportunity to consult with his attorneys and make any necessary corrections before the substantive portion of the interview began. After briefly discussing these corrections, Bolanos then started the process of going over the questions on the application with Posada and asking additional questions to clarify or fill out the record. This pattern began with the questions relating to basic biographical information (e.g., name, date of birth, social security number, citizenship status, marriage and family status) and continued over the course of the interview as Bolanos moved through the application – in many instances repeating the questions verbatim as they appear on the Form N-400 – and solicited additional information as necessary.[6] Finally, at the conclusion of the interview, Posada

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[6] To take just one example, at one point Bolanos asked if Posada had ever given false or misleading information to any U.S. government official while applying for immigration benefits or to prevent deportation, exclusion, or removal, a question that appears on the Form N-400 and to which Posada had checked the "yes" box. In the interview, Posada averred that he had given false information by lying to an immigration officer shortly after arriving in the United States. Bolanos followed up on this answer by asking when this had occurred, and in the ensuing discussion the circumstances of the incident were fleshed out. When the subject had been exhausted, Bolanos moved to another question from the Form N-400, and the interview continued in this vein.

initialed the additional corrections to the Form N-400 that had been made during the course of the interview and, in accordance with the regulations, signed his name in the presence of Bolanos.

Nor did the questions posed by the government during the interview exceed the legitimate scope of inquiry delineated by the regulations. The district court suggested the opposite when it found that the government made misrepresentations to Posada about the purpose of the interview in response to objections raised at the interview by Posada's attorneys. In response to these objections, which charged that several lines of inquiry opened by the government were outside the scope of the naturalization proceedings because they related to events that occurred outside the "statutory period" for which a naturalization applicant is required to demonstrate good moral character,[7] Bolanos repeatedly stated that the questions were being asked for purposes of the record and that Posada's answers would be used to adjudicate his application. With these statements clearly in mind, the district court found that:

> [T]he Government engaged in fraud, deceit, and trickery when it misrepresented to [Posada] that the purpose of asking him such

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[7] Naturalization applicants are required to establish good moral character for a "statutory period" of five years preceding the date of filing the application as well as the period from the date of filing to admission to citizenship. *See* 8 U.S.C. § 1427(a); 8 C.F.R. § 316.10.

> extensive questions about his means of entry into the United States, his conduct in Panama and Venezuela, and his use of various aliases and passports was merely to "clarify the record." The Court ponders exactly which record the Government sought to clarify. The Government did not merely ask him questions directed towards a moral character determination. They questioned him extensively about bombings and other violent activities. The mere fact that they had to question him about bombings belies the argument that this was a routine naturalization interview.

Here the district court seems to have taken the view that questions about Posada's means of entry into the United States, his "conduct in Panama and Venezuela" (presumably his alleged involvement in the 1976 Cuban airliner bombing and a plot to assassinate Fidel Castro), and his use of various aliases and passports were irrelevant to adjudicating his naturalization application (and, specifically, irrelevant to the moral character determination), and that Bolanos's assertions to the contrary during the interview were, therefore, misrepresentations. This was error.

Preliminarily, it is important to note that though the naturalization applicant's burden is only to demonstrate good moral character during the statutory period – roughly the preceding five years, *see* 8 C.F.R. § 316.10(a)(1) – it does not follow that the applicant's conduct outside the statutory period lies beyond the

scope of the moral character determination. The regulations expressly provide that USCIS:

> is not limited to reviewing the applicant's conduct during the five years immediately preceding the filing of the application, but may take into consideration, as a basis for its determination, the applicant's conduct and acts at any time prior to that period . . . if the earlier conduct and acts appear relevant to a determination of the applicant's present moral character.

Id. § 316.10(a)(2). Thus, the government was clearly within its rights to inquire into matters relevant to the moral character determination even though they may have occurred outside of the statutory period for which the applicant bears the burden of proof.

More to the point, though, the inquiries found objectionable by the district court were all manifestly relevant to the adjudication of Posada's naturalization application and the moral character determination. No explanation is required for the proposition that the government's questions about "bombings and other violent activities" were relevant to Posada's moral character. With regard to Posada's entry into the United States, the government was aware of reports tending to indicate that he had entered by sea into Miami aboard the *Santrina*, and thus it had reason to believe that he had lied to immigration officials at the May 21, 2005, interview, where he claimed otherwise. It follows that the government was justified in inquiring into this subject at the

naturalization interview, because whether Posada lied to immigration officials is relevant to both the moral character determination and the specific questions on the Form N-400 that ask if the applicant has ever "given false or misleading information to any U.S. government official while applying for any immigration benefit or to prevent deportation, exclusion, or removal" or "lied to any U.S. government official to gain entry or admission into the United States." The government's inquiry into Posada's use of aliases and passports was similarly justified. The Form N-400 specifically asks the applicant to list all other names used; among other things, this information obviously facilitates the government's investigation into the applicant's background. And since the government also had reason to believe that Posada had not in fact listed all of the names he had used (owing to the discovery of the Guatemalan passport at the Caribe Foundation offices in Miami), whether he had lied or misled immigration officials about this issue was also relevant.

Thus, there simply is no basis for the district court's conclusion that the government misrepresented to Posada the purpose of asking him certain questions at the interview. Bolanos told Posada that the questions were being asked for purposes of the record and in order to adjudicate Posada's application, and she further asserted that the government had the right to inquire into conduct outside the statutory period in making the moral character determination. Because the regulations make clear

that the government did have the right to inquire into these matters, which we agree were entirely relevant to adjudicating Posada's application, there is no basis in the record to find that the government misrepresented the purpose of the questions at the interview.

Finally, we note that apart from the actual interview proceedings themselves, the district court also found the Department of Justice's involvement in this case "suspicious." Specifically, the district court noted that Bolanos met with an attorney from the Department of Justice (along with attorneys from the Department of Homeland Security) prior to Posada's naturalization interview, and that everyone at this meeting "reviewed" the questions to be asked at the interview. But there is nothing inherently improper about this type of contact, especially given that the regulations governing naturalization proceedings expressly require USCIS to coordinate with outside law enforcement entities – including the FBI, an arm of the Department of Justice – in the course of investigating an applicant. *See* 8 C.F.R. § 335.1 (investigation to include, among other things, "police department checks"); § 335.2(b) (interview to occur only after completion of criminal background check by the FBI). Nor is there anything in the record that would allow us to conclude that the contact in this case was improper. Posada suggests that the "Government" (apparently the FBI) should not have provided USCIS with documents from criminal investigations relating to Posada's entry into the United States and the 1997 string of bombings in

Havana (from the record it appears that the FBI provided at least one document related to the Havana bombings), but again, this is cooperation of the sort that is expressly contemplated by immigration regulations. It does not amount to government deception or misconduct.

3. Outrageous Conduct

After determining that the government's conduct was deceptive, the district court additionally found the government's tactics "so grossly shocking and so outrageous as to violate the universal sense of justice." Insofar as this finding refers to conduct of the government other than the conduct that we have already discussed and determined not to have been improper, we note that to demonstrate outrageous government conduct Posada needs to "show government overinvolvement combined with a passive role by [himself]." *Asibor,* 109 F.3d at 1039. Outrageous conduct will not be found when "the defendant is an active, willing participant in the criminal conduct that leads to his arrest. . . ." *Id.* "Such a violation will only be found in the rarest circumstances." *Id.* (citation and internal quotation marks omitted).

Here there can be no doubt that Posada was an active, willing participant in the conduct for which he was charged with a crime. Posada submitted the allegedly false Form N-400 and was a willing participant in the naturalization interview in which he is

alleged to have made false statements. There is no basis for a finding of outrageous conduct here.

B. Suppression of the Interview Statements

We next consider the district court's decision to suppress Posada's statements at the naturalization interview. Applying due process principles, the district court suppressed these statements on the basis that the translation provided by the interpreter at the interview was incompetent, and that this incompetent translation resulted in prejudice to Posada.

The government first challenges this ruling by arguing that due process considerations do not apply in this case and that Posada had no right to a competent interpreter at the interview. The district court concluded otherwise, by analogizing to a case involving the use of an interpreter in deportation proceedings, and determined that "the presence of a competent interpreter was . . . critical to the fairness of the naturalization interview because the interpreter was provided by the Government and the statements made later served as the basis for [Posada's] indictment." The government, arguing that these concerns are misplaced, cites a Second Circuit decision for the proposition that there is an "important distinction" between removal proceedings and interviews to adjudicate an immigration benefit; namely, that in the latter situation the individual has affirmatively petitioned for a benefit. *See Abdullah v. INS*, 184 F.3d 158, 165 (2d Cir. 1999) (assuming that

due process protections apply but noting that applicants for special agricultural worker status, i.e., an immigration benefit, face the government in a posture similar to immigrants applying for admission at the border, who have no constitutional rights in connection with their application).

In the end, we need not decide whether or to what extent due process considerations apply in naturalization proceedings, because we agree with the government that the crux of the district court's decision, though couched in due process terms, ultimately lies elsewhere. Specifically, the district court's concern seems to have been that incompetent translation at the naturalization interview rendered ambiguous the communications between the government and Posada and caused Posada to misunderstand the questions posed to him. Indeed, this much can be seen in the district court's explanation that Posada suffered "prejudice" because the interviewers "believed they were asking one question, while [Posada] thought they were asking another"; and because "[n]o effective communication existed between [Posada] and the interviewers; they were, so-to-speak, 'not on the same page.'"[8]

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[8] Along the same lines, in a discussion of the deficiencies it identified in the translation provided by the interpreter, the district court noted instances where it found that: "the use of the wrong words and/or addition of words. . . . caused severe confusion during the interview"; "the question that the interviewer asked [was] not the question that [Posada] answered"; there was

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This is, at bottom, a false statements case. In such cases, it is not uncommon for a defendant to argue that because of some ambiguity or uncertainty in the question he is alleged to have answered falsely, his understanding of the question differed from that of the government (thus making the evidence insufficient to prove an essential element of the offense, usually some variation of the requirement that the statement was false and that the defendant knew it to be false). *See United States v. Bell,* 623 F.2d 1132, 1136 (5th Cir. 1980) (collecting cases). In these circumstances, the rule is that "the defendant's understanding of the question is a matter for the jury to decide," subject to an exception for cases where "'a reasonably minded jury must have a reasonable doubt as to the existence of the essential elements of the crime charged.'" *Id.* (quoting *United States v. Reynolds,* 511 F.2d 603 (5th Cir. 1975)). This exception is a narrow one. "It is only in exceptional cases that a question is so ambiguous, fundamentally ambiguous, such that no answer can be false as a matter of law. If there is no fundamental ambiguity, the jury resolves any ambiguities." *United States v. Damrah,* 412 F.3d 618, 627 (6th Cir. 2005).

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a "break-down in communication between Bolanos and [Posada]"; there was a "line of questioning that was confusing"; the interpreter "interpreted his own version of [a] statement [that] did not represent the spirit of the conversation"; and "[t]here [was] no guarantee that [Posada] understood the question being asked."

We see no reason why our analysis here should not be guided by this general approach. The district court's finding that the interviewers asked one question but Posada answered a different one, as well as its finding that Posada and the interviewers were "not on the same page," seem to us in substance nothing less than a determination that, due to the vagaries of translation, Posada did not understand the questions put to him. And by ordering Posada's statements suppressed entirely, instead of allowing the jury to consider them, the district court essentially concluded that, as a matter of law, Posada's answers could not form the basis for a false statements conviction. To borrow the phrase employed by the Sixth Circuit, the district court found fundamental ambiguity.

Posada's argument that *Bell* and other similar cases are distinguishable because they did not involve pre-trial challenges to the reliability of an interpreter's translation is unavailing. This case is different in that the misunderstanding is thought to have arisen out of errors in translation rather than, say, the use of unclear language in phrasing the question, as might occur in the usual case. But it does not follow that the basic standards for determining whether fundamental ambiguity exists should not apply. In fact, in considering and rejecting a claim that translation errors rendered the questions and answers at issue in a false statements case "fatally ambiguous," the Second Circuit appears to have hewn quite closely to the standards we have discussed

above. *See United States v. Moon*, 718 F.2d 1210, 1240-41 (2d Cir. 1983). We see no reason not to do so here as well.

In suppressing Posada's statements at the interview, the district court found numerous instances where words were incorrectly interpreted, where Posada appeared to be confused over questions and provide unresponsive answers, and where Posada expressed difficulty understanding what was said to him. A few examples of the deficiencies identified by the district court will suffice. At one point Posada was asked, in English, "But, from the time you were released from jail in Panama until you entered Mexico in March 23rd or 24th, you haven't been to Mexico?" The district court determined that the question put to Posada in Spanish by the interpreter, however, was a slightly different one: "Then, from the time you had been freed in Panama until you entered Mexico – 23rd or 24th of March, you had never been to Mexico prior to that date?" This, the district court observed, "could potentially cause numerous problems with respect to a time line and the Government's theory as to how [Posada] entered the country."

Posada was later asked, in English, "[A]fter you'd been arrested in Panama, did you ever tell any government officials that you had abandoned a plan to detonate a car bomb in Panama?" The district court determined that the interpreter changed the meaning of this question by inserting a reference to the "North American" government. And at another point, the district court determined, the interpreter similarly

injected an issue into a question that asked whether Posada had ever received passports from any other country by translating the question to ask whether Posada had received any passports from another country *that were not legal.*

The problem with the district court's analysis is that it failed to concentrate on the particular questions or line of questioning that led to the statements charged as false in the indictment. Our caselaw makes clear that although it is of course proper to consider the allegedly false statement "in the context in which it was given," it is still necessary to focus on the "crucial question and answer." *Bell,* 623 F.2d at 1136, 1137. This is consistent with the practice in other circuits. *See, e.g., United States v. Reilly,* 33 F.3d 1396, 1418 (3d Cir. 1994) (reviewing specific question-and-answer exchange underlaying false statement charge); *Moon,* 718 F.2d at 1239-41 (reviewing several specific exchanges in which false statements were alleged).

The Second Circuit's decision in *United States v. Moon* is particularly instructive in this regard. It demonstrates that translation errors apart from the critical question and answer, even if occurring in close proximity thereto, do not infect the crucial question and answer with ambiguity absent some special relationship. In *Moon,* the defendant challenged the questions and answers that led to his conviction on several counts of perjury as "erroneously translated and fatally ambiguous." 718 F.2d at 1239. With regard to one allegedly false answer to a question, the

defendant argued that his immediately preceding two answers "were inaccurately translated and somehow cast the third answer in a misleading context." *Id.* at 1240. The court rejected this argument, reasoning that "[e]ven assuming inaccuracies with respect to the interpretation of the first two answers, we fail to see any relationship between them and the third answer, the one alleged to be false." *Id.* at 1240-41.

It was not permissible for the district court to suppress Posada's statements at the interview unless translation errors affected the crucial questions and answers relevant to the false statements charged in the indictment in such a way that these statements, as a matter of law, may not form the basis for a false statements conviction. Otherwise the matter of Posada's understanding of the questions should have been left to the jury. *See Bell,* 623 F.2d at 1136. As we have explained, this question is to be removed from the jury only when "'a reasonably minded jury *must* have a reasonable doubt as to the existence of the essential elements of the crime charged.'" *Id.* (quoting *Reynolds,* 511 F.2d 603 (5th Cir. 1975)) (emphasis added). This point is reached "when it [is] entirely unreasonable to expect that the defendant understood the question posed to him." *Reilly,* 33 F.3d at 1416 (internal quotation marks omitted, brackets in original). "A question is not fundamentally ambiguous simply because the questioner and respondent might have different interpretations." *United States v. Culliton,* 328 F.3d 1074, 1079 (9th Cir. 2003).

Given this high threshold, the record simply does not support a finding of fundamental ambiguity. Or, put another way, there is no basis to conclude that, as a matter of law, Posada could not have understood the particular questions or lines of questions that led to the statements charged as false. Below we examine the relevant portions of the interview as they pertain to the various false statements charged in the indictment. We clarify that we do not hold here whether Posada did in fact understand the questions; indeed, he may wish to argue to the jury that for some reason he did not and, therefore, that his answers are not false statements within the meaning of the relevant statutes. We simply think that this is a matter for the jury to decide.

The indictment charges that Posada falsely stated that he never had any type of documentation, passport, or identification from Guatemala. The district court identified no translation errors in the portion of the interview relating to this topic, and we see nothing that would suggest that Posada did not understand the relevant questions. The interviewer asked, "Guatemala, have you ever had a passport from Guatemala?" This was translated as, "Guatemala, ¿usted tuvo un pasaporte de Guatemala?" Posada replied, "No." The interviewer later asked, "Nothing from Guatemala, ever?" This was translated as "Nunca, ningun de Guatemala," to which Posada replied, "Que yo recuerdo, no," or, in English, "That I remember, no." There is nothing fundamentally ambiguous about this exchange.

The indictment also charges that Posada falsely stated that he never saw the *Santrina* while traveling to the United States in March 2005 and that he never saw several individuals on board the ship at that time. From the discussion immediately preceding the crucial questions and answers on this point it is clear that Posada was aware of reports that he had arrived into Miami aboard the *Santrina*, and was also aware that Castro had made statements to that effect. Posada was then asked, "When you were in Mexico, did you ever see the *Santrina*?" This was translated as, "¿Cuando usted estuvo en Mexico, usted vio el *Santrina*?" Posada replied, "No." The topic of discussion then turned to the various other individuals that the government believed were aboard the *Santrina* with Posada. After these individuals were named, Posada was asked, "Did you see them at all while you were in Mexico?" This was translated as, "¿Cuando usted estuvo en Mexico usted alguna vez a estata personas las vio?" Posada replied, "No." Again, there is no basis for concluding here that, because of translation errors or otherwise, Posada could not have understood these questions as a matter of law.

The same can be said about the questions and answers relevant to the indictment's charge that Posada falsely stated that he was never in Cancun or Isla Mujeres when traveling to the United States in March 2005. Posada was asked, "Were you ever, in the trip to the United States in March of 2005, were you ever in Cancun?" This was translated as, "En el viaje que usted hizo a los Estados Unidos en marzo de

2005, ¿usted estuvo en Cancun?" Posada answered, "No." He was then asked, "Were you ever in Isla Mujeres?" Again he answered, "No."

Finally, the indictment charges that Posada falsely claimed to have entered the United States in March 2005 in Texas. This topic was thoroughly discussed at the interview, and at points errors in translation seemed to have caused some confusion over the "timeline" of this trip (as noted by the district court). But the ambiguity, if any, concerning the statements relating to Posada's manner of entry into the United States falls far short of fundamental ambiguity, as in other instances Posada seems to have clearly understood the significance of the government's questions. For example, Posada was asked when he had last entered the United States ("La ultima vez que usted entro aqui a los Estadoes Unidos, ¿cuando fue?"). He responded, "In marzo, creo, en marzo del ano 2005," meaning, "In March, I believe, in March of the year 2005." Shortly thereafter, after Posada indicated that this was around the 17th or 18th of March, he was asked, "And when you came to the United States in March 17th or 18th, where did you enter?" This was translated as, "Cuando usted se vino a Estados Unidos en marzo 17 o 18, ¿por donde usted entro a los Estados Unidos?" In response, Posada indicated that he entered through Matamoros (which is, of course, on the Texas border).

In sum, the district court erred in suppressing Posada's statements at the interview because it did not focus on the specific questions and answers

relevant to the false statements charged in the indictment. And since there is nothing fundamentally ambiguous about these questions and answers (whether by reason of faulty translation or otherwise), they should not have been suppressed.

IV. Conclusion

For the foregoing reasons, the dismissal of the indictment in this case is REVERSED and the suppression of Posada's statements at the naturalization interview is REVERSED. This case is REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA	§	
	§	**EP-07-CR-0087-KC**
v.	§	
LUIS POSADA CARRILES	§	

ORDER

(Filed May 8, 2007)

On this day, the Court considered "Defendant Luis Posada Carriles' Motion to Exclude Transcripts and Tapes of Naturalization Interviews" ("Motion to Exclude Tapes and Transcripts") and "Defendant Luis Posada Carriles' Motion to Suppress Evidence and Statements" ("Motion to Suppress Evidence"). For the reasons set forth herein, Defendant's Motion to Exclude Tapes and Transcripts is **GRANTED** and Defendant's Motion to Suppress Evidence is **GRANTED**. Furthermore, the indictment is hereby **DISMISSED**.

I. BACKGROUND

Defendant Luis Posada Carriles ("Defendant") is a seventy-nine (79) year old Cuban national who has spent his life opposing Fidel Castro. Between 1960 and 1964, he served in the United States Army and later became involved with the Central Intelligence Agency. In March of 2005, Defendant entered the United States seeking asylum, and later filed an

application for naturalization. He was scheduled to attend an interview with the Department of Homeland Security ("DHS") Citizenship and Immigration Services ("USCIS") on May 17, 2005, but cancelled the interview, withdrew his application for asylum, and held a press conference instead. Later that day, DHS Immigration and Customs Enforcement ("ICE") took him into custody.

On January 11, 2007, a federal grand jury returned a seven count indictment against Defendant. The indictment charges him with one count of violating 18 U.S.C. § 1425(a) by making false statements in the course of his application for United States citizenship. The indictment also charges Defendant with committing six separate violations of 18 U.S.C. § 1015(a) by making various false statements in connection with his attempted naturalization. In one of these six counts, the United States charges that he made a false statement by representing that he had used only the names "Luis Clemente Posada Carriles," "Ramon Medina," and "Franco Rodriguez" on various passports when, in fact, he obtained, possessed, and used a fraudulent passport issued by the Republic of Guatemala bearing his photograph and the name "Manuel Enrique Castillo Lopez."

It is Defendant's contention that as early as April 21, 2005, the Government through various agencies (including ICE and the Federal Bureau of Investigation ("FBI")) began an investigation into his history and manner of entry into the country. Unaware of this investigation, on October 11, 2005, Defendant

filed an application for naturalization ("Form N-400") pursuant to section 329 of the Immigration and Naturalization Act ("section 329") based upon his honorable discharge from the United States military during a time of hostilities. While this application was pending, Defendant claims that the Government continued to investigate his alleged aliases, an alleged voyage on the vessel "Santrina," and documents pertaining to his alleged involvement in a 2000 plot to assassinate Fidel Castro. Moreover, in July of 2005, Defendant claims that an informant began cooperating with the FBI regarding allegations of Defendant's presence on the vessel Santrina in exchange for monetary rewards and assistance with his citizenship application. In sum, Defendant alleges that by the time he was scheduled for a naturalization interview in April of 2006, federal agents had already assembled a significant dossier against him.

The Government argues that prior to Defendant's interview of April 2006, federal agents executed a search warrant during the course of an unrelated investigation and discovered a passport in the name of "Manuel Enrique Castillo Lopez," bearing Defendant's picture and stamps indicating entry into Mexico in the state of Quitana Roo.

On May 4, 2007, this Court conducted an evidentiary hearing regarding both of Defendant's Motions. During that hearing, the Court heard oral argument and received testimony from two witnesses: Susana Bolanos and Carlos Spector.

Susana Bolanos ("Bolanos") is an adjudications officers with USCIS. Her duty station is in Washington, D.C. and she specializes in cases involving fraud and national security. She conducted Defendant's naturalization interview on April 26 and 27, 2006 at the El Paso Service Processing Center. Present with her at this interview were Defendant and his two attorneys, Felipe Millan ("Millan") and Maria Trina Burgos, a DHS attorney named Jo Ellen Ardinger ("Ardinger"), an attorney with the Department of Justice ("DOJ") Office of Immigration Litigation named Nick Perry ("Perry"), a Spanish interpreter named Luis Granados ("Granados"), and a "special response team" videotaping the interview.

During the May 4, 2007 hearing, Bolanos testified that she had conducted only three to four interviews within the last year. All of them were videotaped, yet the interview at issue is the only one in which the tape is unavailable because of alleged equipment malfunction. In addition, Bolanos admitted that it was unusual for her to be brought in to handle this interview; that it was an earmark of irregularity.

Bolanos first received Defendant's Alien File ("A-File") approximately five to six months before his scheduled interview. Upon receipt of the file, she conducted her own research via newspaper articles, books, and internet. When she first reviewed Defendant's application, she determined that he was probably not eligible for naturalization due to his prior conviction for public endangerment in Panama,

but scheduled an interview with him nonetheless. She testified that it was standard practice to grant everyone a naturalization interview, that he was entitled to the interview, and that she had never denied anyone citizenship without an interview.

While preparing for the interview, she testified that she met with Ardinger, Perry, and another unnamed DOJ attorney. This meeting took place between two and four weeks before Defendant's scheduled naturalization interview. The purpose of this meeting was to discuss the "flow" of questioning, as both Ardinger and Bolanos were set to question Defendant. By "flow," Bolanos testified that she meant that everyone wanted to make sure that they were all understanding the questions and that there would be continuity between Ardinger and Bolanos during the questioning. She testified that everyone reviewed all of the questions.

She denied the suggestion that anyone present at this meeting urged her to ask any question in particular. She stated that she asked about the Havana bombings, the Guatemalan passport, and Defendant's means of entry because they were just "part of the review," based upon the newspaper articles, A-File, and classified materials she had reviewed to prepare for the interview. She testified that someone must have made her aware of the Guatemalan passport, but that she could not recall who that might be. She also admitted that illegal entry charges are immigration issues, not criminal issues, but that possession of

a fraudulent Guatemalan passport is a criminal offense.

She acknowledged that she does not meet with the DOJ in every case, and that she is aware that the DOJ is the prosecutorial arm of the executive branch of government. She also acknowledged that she was aware that Ardinger was a DHS attorney and more likely than not handled criminal cases. Nevertheless, she denied any awareness of two separate investigations. When asked what she thought of the fact that so many Government attorneys attended a pre-interview meeting and the actual interview, Bolanos responded that she thought it was a significant case for everyone based on Defendant's background.

She testified that the purpose of a naturalization interview is to determine whether an applicant meets the eligibility requirements for the particular section of the statute under which they are seeking naturalization. She testified that the purpose of her questions during Defendant's interview was to verify information provided on the Form N-400, update it, and correct it. She asked questions about Defendant's former aliases to understand what documents were obtained in connection with them, in what context they were used, and how recently they were used. All this was done, she claims, in order to determine whether he had the requisite moral character for naturalization. She admitted, however, that this interview was atypical because there was more material for her to cover and it was more extensive.

Upon commencement of the interview, Bolanos read the following to Defendant:

> This proceeding is being audio-visually recorded to ensure that a complete record is made.
>
> Today's date is APRIL 26, 2006. The time is _____.
>
> This is the United States Department of Homeland Security, Citizenship and Immigration Service. El Paso District Office. I am Adjudications Officer Susana Bolanos, with me to assist with this interview are Jo Ellen Ardinger and Nick Perry, DHS attorneys. A Spanish language interpreter, Luis Granados, is also present today to assist us in communicating when appropriate and necessary to ensure that I am able to obtain all the information required to fully adjudicate your application.
>
> The case file number is A12 419 708. We will be beginning the initial examination on the Application for Naturalization, Form N-400, filed by Mr [sic] Luis Clemente Posada Carriles on October 12, 2005 with this agency. This application was filed under Section 329 of the Immigration and Nationality Act as amended.
>
> We are conducting an administrative proceeding in reference to the aforementioned case to determine eligibility for the benefit sought.

Also present at this interview is your attorney of record: Maria Trina Burgos. Understand that your attorney's role at this interview is to ensure that your legal rights are protected. Your attorney cannot respond to questions directed to you, or otherwise disrupt the interview. If your attorney disrupts the interview, I may choose to terminate the interview. If the interview is terminated for this reason, your application will be treated as if you failed to appear for the interview.

Do you understand what I just said? Do you have any questions at this time?

This proceeding shall be conducted under oath. All statements you make constitute sworn testimony. Any statements you make today can and may be used for any purpose in any legal or administrative proceeding. If you don't know the answer to a question you are asked today, please don't guess but rather tell me you don't know the answer. If you don't understand any questions today, please stop me and tell me you don't understand so that the question can be repeated, rephrased, or clarified. If you feel a truthful answer to a question would tend to incriminate you, you can exercise your constitutional right against self-incrimination. If you lie or intentionally give misinformation, you may be subject to criminal or civil penalties or barred from immigration benefits, including naturalization. You are here voluntarily

> and you may choose to terminate this proceeding at any time.
>
> To be sure you completely understand, I'm going to have the interpreter repeat what I just said to you in Spanish.

She testified that the following two statements are usually not provided during naturalization interviews, but that everyone present at the pre-interview meeting decided to insert them:

> If the interview is terminated for this reason, your application will be treated as if you failed to appear for the interview.
>
> If you feel a truthful answer to a question would tend to incriminate you, you can exercise your constitutional right against self-incrimination.

The interview lasted for approximately eight hours over the span of two days. She testified that she thought that, at the time of the interview, the A-File included a Form N-426 certifying Defendant's honorable discharge from the United States Armed Forces. She also testified that she did not fingerprint Defendant and could not answer as to whether someone else had.

She testified that she knew of Defendant's previous conviction for an aggravated felony in Panama, but when asked whether the naturalization interview was an exercise in futility because there was a legal basis to deny the application, she said that she could not answer yes or no. She further testified that at

some point she became aware of a criminal investigation of Defendant but could not remember when that occurred.

In addition to Bolanos' testimony, the Court also received the testimony of Carlos Spector ("Spector"). Defense offered him, and the Government accepted him, as an expert witness for purposes of the hearing. He testified that an individual who has been honorably discharged from the military and who served during periods of hostility as defined by the executive branch is eligible for naturalization under section 329. In order to obtain such naturalization, he testified that it is necessary to submit a Form N-426 certifying prior service with an Application Form N-400 because USCIS will not act upon an application under section 329 until they have certification of prior service. An applicant will also need to establish good moral character for at least one year prior to filing an application for naturalization.

Spector testified that he has attended over 900 immigration interviews, and that in his experience, interviews are not granted in cases where the petitioner is clearly ineligible for naturalization. For example, he testified that in cases where someone has been convicted of an aggravated felony, they are statutorily barred from establishing good moral character and that the only reason such person would be invited to the processing center would be for the purpose of beginning removal proceedings. He described a conviction for an aggravated felony as the "kiss of death in immigration law." He also testified

that he has never had a client who was convicted of an aggravated felony but who received an executive pardon.

Spector testified that in his 900 interviews, not one had ever been video or audio-taped, involved two people asking questions, lasted two days, or involved a Government-provided interpreter. Rather, he testified that immigration interviews are usually conducted by one person, last a maximum of thirty minutes, and do not involve Government-supplied interpreters. Moreover, they usually do not involve the presence of DHS lawyers who also participate in the interview.

Spector testified that case law makes clear that illegal re-entry is not a crime of moral turpitude and does not effect one's moral character determination. Moreover, there is no section on the Form N-400 that deals with one's means of entry into the country. Put simply, the question of how someone entered the country is not relevant to the determination of his eligibility for naturalization.

When pressed about the requirement for a Form N-426 in connection with a naturalization interview, Spector admitted that there is no statute or regulation requiring the interviewer to have an N-426 "in their hand" at the interview. He noted though, that at interviews based on section 329 it is common practice for the adjudications officer to have the Form N-426 and provide the petitioner with a copy.

Though the absence of a Form N-426 certifying Defendant's former service in the United States Armed Forces was an issue contested during the May 4, 2007 hearing, the Government has since discovered and provided Defendant with a copy of his Form N-426, which was certified by fax on October 25, 2005.

The Court understands that there are two audio recordings of the April 2006 interview at issue in this case: an original cassette recording and an enhanced digital copy. With the aid of a court-certified interpreter, the Court has reviewed the digital copy multiple times.

II. DISCUSSION

A. Transcripts and Translation

Defendant moves to exclude the tapes and transcripts of Defendant's naturalization interview on the following grounds: (a) the poor quality and excessive inaudible portions of the tapes, (b) inaccurate transcription and translation of the tapes by an uncertified translator, and (c) inaccurate interpretation during the interviews conducted by an uncertified interpreter. Defendant argues that these deficiencies are so egregious, in light of the fact that they form the basis for the indictment, as to render the tapes and transcripts unreliable and inadmissible.

The Government responds by arguing that although portions of the original tape may be inaudible, the enhanced digital copy is mostly audible and thus

the inaudible portions do not render the tape or digital copy untrustworthy. The Government further argues that if the Defendant takes issue with the Government's transcript, then Fifth Circuit precedent dictates that the solution is for the Defendant to provide his own version of the transcript and for the judge to submit both to the jury. Finally, the Government argues that the interpreter used in the hearing is qualified, and that Defendant had a Spanish-speaking lawyer present who presumably could have and would have objected to interpretations he deemed inadequate.

1. Poor Quality of the Tapes

The Fifth Circuit has not adopted a formulistic standard regarding the admissibility of tapes and transcripts. *United States v. Greenfield,* 574 F.2d 305, 307 (5th Cir. 1978). When a tape recording is challenged as being partially inaudible, there is no *per se* rule mandating exclusion. *Id.* Rather, tapes which contain inaudible portions are admissible unless the inaudible portions are "'so substantial as to render the recording as a whole untrustworthy.'" *United States v. Jones,* 693 F.2d 343, 346 (5th Cir. 1982) (citing *United States v. Nicoll,* 664 F.2d 1308, 1314 (5th Cir. 1982)); *Greenfield,* 574 F.2d at 307 (citing *United States v. Avila,* 443 F.2d 792, 795 (5th Cir. 1971)). This determination is left to the sound discretion of the trial judge. *Greenfield,* 574 F.2d at 307.

In the instant case, the Court has conducted a review of the digital copy of the entire naturalization interview, with the assistance of a court-certified interpreter. Having reviewed the digital copy, the Court finds that the inaudible portions are not so substantial as to render the digital copy untrustworthy. The Court's review of the digital copy reveals that several of the passages marked "inaudible" in the Government's transcript are, in fact, clearly audible. Accordingly, to the extent Defendant seeks to exclude the tapes as containing inaudible portions, the Defendant's Motion is denied.

2. Inaccuracy of the Transcription

The Fifth Circuit allows the use of tape recordings as long as the party seeking their introduction has laid a proper foundation and the tapes constitute real, as opposed to testimonial, evidence. *United States v. Onori,* 535 F.2d 938, 947 (5th Cir. 1976). When a trial court allows introduction of a tape, it will often allow the introduction of transcripts of the tape to assist the jury. *Id.*; *see also United States v. Thompson,* 2007 WL 841605, at *5-7 (5th Cir. Mar. 21, 2007) ("A supplemental transcript is intended only to aid the jury in its assessment of real evidence."). Whether a trial court will allow the introduction of a transcript lies within the trial court's sound discretion. *Onori,* 535 F.2d at 947 (citing *United States v. McMillan,* 508 F.2d 101, 105 (8th Cir. 1974)). "[I]t is unnecessary for the trial court to decide whether a transcript is accurate before that

transcript is given to the jury, so long as each side to the dispute is given an opportunity to submit a transcript containing its version of a conversation." *Id.* at 948.

In the instant case, as stated above, the Court has conducted a review of the digital copy and compared it with the transcript provided by the Government. Having compared the transcript with the digital copy, the Court has serious concerns about its admissibility. The transcript is imprecise, indicates that many sections are inaudible when they are not, thus omitting key elements of the naturalization interview, and appears to have been transcribed by several different people of varying skill. In short, it does not even approach what would be considered a true and accurate representation of the interview. Though the *Onori* court held that it is unnecessary for a trial court to determine whether a transcript is inaccurate before submission to a jury, it also held that whether or not to even allow introduction of a transcript lies within the trial court's discretion. Moreover, it is this Court's sworn duty to allow only reliable evidence to be submitted to the jury. *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.")

The Court finds that the transcript in this case is so inaccurate that it is not reliable. The danger of prejudice that would result from submitting this

proposed evidence to the jury far outweighs its probative value. As such, to the extent the Defendant seeks to exclude the transcript, Defendant's Motion is granted.

For reasons which will be discussed below, the indictment in this case shall be dismissed. However, were this not the case, there would still be plenty of time for the Government to submit a new version of the transcript to the Court before trial. Defendant would be urged to submit his own version of the transcript, at which point the Court would be in a position to follow the instructions in *Onori*. Alternatively, when the Government completed its new version of the transcript, Defendant would have the option of stipulating to its accuracy.

3. Inaccuracy of the Interpretation

Neither party has provided, nor can this Court find, any case specifically dealing with the quality of an interpretation during the course of a naturalization interview. It is, however, well accepted that "the presence of a competent interpreter is critical to the fairness of a [deportation] hearing." *See Kotasz v. United States*, 31 F.3d 847, 850 n.2 (9th Cir. 1994) (discussing an alien's fundamental right to a full and fair hearing in deportation proceedings and the importance of a competent interpreter as an element of such hearing). This Court finds that, in this case, the presence of a competent interpreter was also critical to the fairness of the naturalization interview

because the interpreter was provided by the Government and the statements made later served as the basis for Defendant's criminal indictment. As such, this Court's task is to determine whether or not the interpreter at issue in this case, provided by the Government though they were under no obligation to do so, adequately interpreted the statements made between the interviewers and Defendant.

The Ninth Circuit addressed an issue similar to the one presented in the context of a deportation proceeding. In *Perez-Lastor v. INS,* 208 F.3d 773 (9th Cir. 2000), the Ninth Circuit reviewed findings by the Board of Immigration Appeals ("BIA") that the petitioner failed to establish eligibility for asylum or withholding from deportation because his testimony was not sufficiently consistent, specific, and credible. *Perez-Lastor,* 208 F.3d at 775. The BIA also ruled that the quality of the translation provided at Perez-Lastor's hearing did not violate due process. *Id.* In reversing the BIA and holding that Perez-Lastor did not receive due process at his deportation hearing because an incompetent interpretation prevented him from presenting relevant evidence, the Ninth Circuit employed a two step inquiry. *Id.* at 777-83. First, the Ninth Circuit asked whether or not the interpretation was a competent one. *Id.* at 778. In evaluating this question, the Court identified three types of evidence tending to prove that the interpretation was incompetent: (1) direct evidence of incorrectly interpreted words, (2) unresponsive answers by the witness, and (3) the witness' expression of difficulty understanding

what is said to him. *Id.* Upon a finding that the interpretation was incompetent, the Ninth Circuit went on to ask whether the incompetent interpretation prejudiced the outcome of Perez-Lastor's case in that it potentially affected the outcome of the proceedings. *Id.* at 780. Deciding that it did, the court held that the testimony given at the hearing could not be considered as evidence in any future hearing because the poor interpretation cast doubt upon its accuracy. *Id.* at 783.

This Court is cognizant of the distinction between a deportation hearing, which is imposed by the Government, and a naturalization interview, in which the petitioner seeks a benefit from the Government. However, the principles regarding the accuracy of an interpretation are the same. After all, the purpose of an interpretation is to allow the alien to understand the questions presented to him and to further allow him to communicate his answers to the questioning body. *Id.* at 778. "'A hearing is of no value when the alien and the judge are not understood.'" *Gonzales v. Zurbrick,* 45 F.2d 934, 937 (6th Cir. 1930) (quoted in *Perez-Lastor,* 208 F.3d at 778). Again, this is especially true when the Government supplies the interpreter and later uses statements made during the course of the interview as a basis for the indictment.

Turning to the case at bar, the first question that this Court must ask is whether the interpretation was a competent one. This Court has extensively examined the enhanced digital copy multiple times with the aid of a court-certified interpreter and has

found numerous instances where words were incorrectly interpreted or not interpreted at all, where Defendant appeared to provide unresponsive answers as a result of his confusion over the questions, and where Defendant expressed difficulty understanding what was said to him. While all of the tapes contained numerous deficiencies, some of the most egregious deficiencies will be discussed below, in chronological order.

a. Tape 1A

In Tape 1A, Bolanos and Ardinger questioned Defendant about his trip through Mexico en route to the United States. The tape began with the warning statement reprinted above in the background section of this order. While it was read in English, Granados failed to interpret much of it for Defendant. In other words, this is worse than incorrect interpretation because it is no interpretation at all. Though Defendant has, on various occasions, indicated that he understands English, the Court understands that recent injuries and partial loss of hearing have affected his ability to do so. In fact, during the May 4, 2007 hearing, Defendant relied exclusively upon the court-certified interpreter in order to better understand the proceedings.

Indeed, Bolanos began conducting the interview in English, but after about twenty-eight minutes it became clear that Defendant could not understand her. At this point, Bolanos provided Defendant with

instructions regarding the use of an interpreter and proceeded to use the interpreter. Thus, because there was no accurate interpretation regarding the introductory warnings, there is no guarantee that Defendant understood the warnings and fully understood his rights.

b. Tape 1B

Tape 1B involved various questions regarding Defendant's activities in Panama and Guatemala. Common mistakes made by the interpreter involved the use of the wrong words and the omission and/or addition of words to certain questions and answers. This is not an acceptable practice in interpretation, and it caused severe confusion during the interview.

At one point in this discussion, Ardinger asks "But, from the time when you were released from jail in Panama until you entered Mexico in March 2005, March 23rd or 24th, you haven't been to Mexico?" Granados interpreted Ardinger's question as, "Entonces, ¿Desde que Ud. lo habían liberado de Panamá hasta que Ud. entró en México 23 o 24 de Marzo, Ud. nunca había estado en México con anterioridad a esa fecha?," meaning "Then, from the time you had been freed in Panama until you entered Mexico – 23rd or 24th of March, you had never been to Mexico prior to that date?" Tape 1B, 05:12. Ardinger attempted to ask Defendant whether he had been to Mexico after his jail time in Panama and Granados, instead, asked him whether he had been to Mexico before his jail

time in Panama. The question that the interviewer asked is not the question that Defendant answered[1], which could potentially cause numerous problems with respect to a time line and the Government's theory as to how he entered the country. This is direct evidence of a substantial incorrect interpretation.

c. Tape 2A

Tape 2A involved extensive questioning about Defendant's use and possession of various passports. At several points in this tape, the interpreter caused confusion. For example, during one series of questioning, Defendant began with a statement that, " . . .

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[1] This is further evidenced by Defendant's discussion about various trips he had taken to Mexico years ago. For example, Defendant responded with, "Pues, sí, pero hace muchos años," meaning, "Well, yes, but it was many years ago." Granados interprets this as, "Yeah, but many, many years ago . . . " Ardinger, on the verge of confusion, stated, "I just want to see if I can understand this. . . ." Granados translated this as, "Bueno quiero asegurarme que entiendo todo para mí . . . ," meaning "Well, I just want to ensure that I understand everything for me." Ardinger continued, "From the time you were released from jail, in 2004, from Panama, until you entered Mexico, on March 23rd or 24th, you have never been to Mexico . . . ?" Granados interpreted this as, "Desde el periodo de tiempo transcurrido desde que Usted lo liberaron de la prision en Panama en el año 2004, hasta que Ud. entró en Mexico en Marzo 23 o 24, ¿Ud. no había estado durante ese periodo de tiempo en México?," meaning "From the period of time elapsed since you were released from the prison in Panama in the year 2004, until you entered Mexico in March 23rd or 24th, you had not been in Mexico during that period of time?" Defendant responded, "No."

pero nunca yo he dicho que soy ciudadano americano," meaning "But I have never said that I am an American citizen." Bolanos then asked, "I understand that you never said it – but you did – you did present the U.S. passport to officials, to immigration officials, in a country?" Granados interpreted Bolanos' question as, "Yo entiendo que usted nunca ha dicho, dice usted que nunca ha dicho que es ciudadano americano, pero ¿usted ha presentado documentación a oficiales de inmigración, documentación que creían que usted es americano?," meaning "I understand that you have never said, you say that you have never said that you are an American citizen, but you have presented documentation to immigration officials, documentation that they believed that you were an American?"

In response, Defendant tried to clarify by stating "¿De los Estados Unidos o de . . . ?," which means "Of the United States or of. . . ." Granados interpreted this as "In the United States?" Bolanos answered "No, other countries." Granados interpreted this as "No, de otros paises," which means "No, of other countries." Bolanos clarified "On . . . in any country." Defendant answered "Sí," which Granados interpreted as "Yes." Finally, Bolanos then stated, "Okay. I'm going to go back and correct the answer to 'yes,' okay?" Finally, the interpreter told Defendant, "Va a cambiar la respuesta de su solicitud a 'sí'. Usted respondío que si," meaning "She is going to change the response in your application to "yes."" You answered "yes." Tape 2A, 2:00.

While this conversation is hard to follow, it appears as though Bolanos was attempting to ask whether Defendant presented a United States passport to immigration officials in any country. Granados, instead of interpreting the question asked, broadened the question to whether Defendant had presented any documentation to any immigration officials such that they would believe he was an American. Again, this is an example of a break-down in communication between Bolanos and Defendant, because while Bolanos thought she was asking one question, Defendant thought she was asking another.

In yet another portion of Tape 2A, Bolanos asked "When – one of the – when you were living outside of the United States already, in Venezuela, you applied to come back for a permit, for an extended permit?" Granados interpreted this as "Cuando usted estaba viviendo en Venezuela ¿Usted submitió una solicitud para regresar como, como residente?," which means "When you were living in Venezuela, did you submit an application to return as . . . as a resident?" Defendant replied "No." Tape 2A, 04:40. Asking whether Defendant applied for a permit to stay in the United States is completely separate and distinct from asking whether or not he applied for residency. In addition to confusing this Court, Granados apparently confused the interviewers as well, as evidenced by their acknowledgment that this line of questioning was confusing, and that it was time to "move on." This confusion is indication of an incompetent interpretation.

Finally, Bolanos and Ardinger asked Defendant if he had ever committed a crime for which he has not been arrested, at which point Millan stated that Defendant would not answer any questions which were beyond the statutory one year period. Bolanos then called for a break, and upon her return, she stated the following: "Just for the record. Uh, if you are choosing to answer those questions like that, just for the record, just make yourself clear that your answers are going to be taken into account in the final adjudication of your application for naturalization." Granados summarized her statement as, "Solamente para que quede claro en el acta . . . could you repeat the question?," meaning "So it can be clear on the record . . . could you repeat the question?" Bolanos then responded, "Just letting him know, that the answers that he is giving today, every answer is going to be taken into account," which Granados interpreted as "Toda respuesta que Ud. de hoy día acá, como ésta que usted ha dado ahora, va a ser tomada en consideración para determinar o no la adjudicación de su petición." In English, what he said was "Every answer that you give today, here, like the one you are giving today, will be taken into account to determine whether to adjudicate your petition or not." Tape 2A, 46.24. Granados summarized and paraphrased Bolanos' statement to such an extent that it caused Bolanos' statements to lose their meaning and effectiveness.

d. Tape 2B

Tape 2B had the worst audio quality of all the tapes. In it, the interviewers discussed with Defendant his jail time in both Venezuela and Panama. At one point, Defendant attempted to explain the circumstances surrounding his escape from a Venezuelan prison. Around the time Defendant discussed these events, the interviewers warned him that limiting his answers to a one year period "may influence any decision made about his application." Defendant made the statement "Cuando vino lo que se llama la aportación de pruebas . . . ," which means "when it came time for what is called the presentation of evidence . . . ," but which was instead interpreted as "when the evidence technicians came. . . ." Tape 2B, 06:30.

Granados was ineffective in communicating Defendant's statements to Bolanos and the DHS attorneys present at the interview. Rather than ask for clarification of either Defendant's or Bolanos' statements, he inserted his own version of the statement, which as it turns out, did not represent the spirit of the conversation.

In another section, Defendant stated "Castro. . . . no se presentó oficialment al juzgado, fue citado por el juzgado y no se presentó a poner la acusación . . . ," which should have been interpreted as "Castro did not appear officially before the Court. He was summoned by the Court and he did not appear to file charges," but was instead interpreted as "Actually,

Fidel Castro never showed up in the tribunal to present the charges as he said. . . ." Tape 2B, 15:20.

Granados altered the spirit of the conversation and inserted "as he said," into the statement, changing its meaning. He also referred to appearance before the "court" as appearance before the "tribunal," which carries various connotations and is not in keeping with Defendant's actual responses.

Finally, at one point Ardinger asks "Uh, after you'd been arrested in Panama, did you ever tell any government officials that you had abandoned a plan to detonate a car bomb in Panama?" Granados interpreted this as "Después que fue arrestado, ¿En alguna ocasión le dijo a algún oficial del gobierno norteamericano que usted había desistido de la idea de poner una bomba en un carro, porque muchos panameños podían morir?," which means "After you were arrested, did you at any time tell any official of the North American government that you had abandoned the idea of putting a bomb in a car because many Panamanians could die?" Tape 2B, 25:59.

As discussed above, this is direct evidence of inaccurate interpretation. The difference between asking someone whether they had told a government official that they had abandoned a plan to detonate a car bomb in Panama and whether they told a "North American" official that they had abandoned the idea of putting a bomb in a car because many Panamanians could die is completely different. There is no guarantee that Defendant understood the question

being asked him and thus there is no guarantee that his answer was an accurate one.

e. Tape 3A

Tape 3A involved a discussion about the overthrow of governments. It started with Bolanos swearing – in Defendant for another day of testimony as follows: "We are going to start the review of your – continue – I'm sorry, continue the review of your application. Uh, on question 5 – uh – which was the question – where we were discussing the overthrow of governments, I don't think[2] that we did go through that completely, so I'm just going to start here. . . ." Granados interpreted this as: "Eh, vamos a continuar con la revisión de su solicitud. Vamos a seguir donde quedamos que estamos hablando de el derrocamiento de gobiernos," which means, "We are going to continue checking your application. We are going to continue where we stopped, we were speaking about the overthrow of governments." Tape 3A, 5:40. This is an inaccurate interpretation.

In another section, Ardinger asked "Did you ever, yourself, try to recruit an individual to assist in the 1997 and 1998 bombing in Cuba?" Granados interpreted this as "¿Ud. personalmente se encargo del reclutamiento de alguna persona que participó en

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[2] This is one example of a transcription error. The transcript said "I think," completely reversing the meaning of the sentence.

estas bombas que explotaron en Cuba en el año 1997 y 1998?," meaning "Did you personally take charge of the recruitment of some/any person who participated in these bombs that exploded in Cuba in the year 1997 and 1998?" Tape 3A, 40:56. Like so many excerpts discussed above, Granados broadened the scope of this question, which raises the issue of whether there could have been effective communication between the people asking the questions and Defendant.

At another point, Ardinger asked, "Uh, I'm going to continue to ask you some questions, I would expect that your attorney is going to have an objection to them. . . ." Granados interpreted this as "Le voy a estar haciendo una series de preguntas ahora. Lo mas probable es que su abogado ponga una objeción a las preguntas," meaning "I'm going to be asking you a series of questions. It is very probable that your attorney will object to the questions." Tape 3A, 42:55. Again, this is inaccurate and may have caused several misunderstandings.

At another point, although the Government had been using the term "objection" throughout the course of the interview, Perry objected to Millan's use of the word "objection." Perry stated "I would just note that 'objection' is not the right term. Your attorney is welcome to provide you advice on what to answer and what not to answer, but this isn't a court hearing and there aren't objections." In addition to numerous other problems implicit with this statement in this context, is the fact that Granados interpreted part of

Perry's statement as "this isn't a trial." Tape 3A, 43:42. This is an inaccurate interpretation, which may have affected Defendant's view of what was occurring at the interview.

f. Tape 3B

Tape 3B involved the issue of overthrowing governments and possession of various passports. In one section, Bolanos asked "Mr. Carriles – sorry, Mr. Posada Carriles, have you ever taught or promoted the overthrow the Cuban government." Granados and Bolanos then seemed to discuss how exactly to proceed with the question. Granados began "Have you ever." Bolanos prompted what seemed like the word "thought," but was actually "taught." Granados asked "Taught or promoted? . . . " Bolanos encouraged "Uh-huh." At this point Granados finally posited, "Eh. Sr. Posada Carriles, en elguna ocasión usted ha enseñado o ha promovido . . . ," meaning "Uh, Mr. Posada Carriles, at some time have you taught or promoted. . . ." Obviously confused, Defendant responded, "Taught? What do you mean taught?" Tape 3B, 00:22.

In order to figure out this section of the tape, the Court, with the assistance of a court-certified interpreter, reviewed the tape approximately fifteen (15) times.[3] It was so difficult to understand Bolanos, that not only did the interpreter require clarification, but

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[3] There were several sections of the interview that had to be reviewed between fifteen (15) and twenty (20) times.

the translator and the transcriber got it wrong as well. When the question was finally asked, the Defendant did not understand it. It had to be explained to him.

In another section, Bolanos asked, "Have you ever acquired or been in possession or received an immigration document that was not lawfully issued?" While both the transcriber and the transcript indicate that she meant "locally issued," indicating that Bolanos was difficult to understand, Granados interpreted this as "¿En alguna ocasión usted ha adquirido, ha poseido, o ha recibido algún documento de inmigración que no sea válido, que no sea verdadero?," which means "At any time have you acquired or possessed or received an immigration document that is not valid, that is not a real document?" Tape 3B, 07:35. While Granados interpreted the statement correctly in the end, the tone and tenor of the tape indicate that Bolanos was so hard for everyone to understand, including the interpreter, that this Court cannot be assured that there was a "meeting of the minds."

In yet another portion of the tape, Bolanos asked "Have you ever received passports from ano . . . any other country?" Granados interpreted this as, "¿Y usted en alguna ocasión ha recibido pasaportes que no sean legales de otro país?," which means "And have you at any time received passports that were not legal from another country?" In this question, Granados completely inserted the issue of legality

into the question when Bolanos had not. Tape 3B, 11:03.

g. Tape 4A

Tape 4A involved questions regarding Defendant's use of names and nicknames. This was also the point at which Defendant was asked to initial the changes to his Form N-400 application. Upon termination of the interview, Bolanos stated, "Okay. Uh – we have a complete set of questions for today. We have to – uh – because we all agree, probably, that we have a lot of information to review. We are going to go back and review the application, the testimony, the video and everything. Uh – once we do that, if we still have questions, we're going to set up another appointment to clarify. You're going to have to clarify those answers. Give us an opportunity to clarify your answers, so that we can make a complete adjudication. Okay?" Granados did not interpret this, but merely asked Defendant, in Spanish, if he understood, to which Defendant replied "Yes," but after which Defendant proceeded to make a statement. This is, again, a complete lack of interpretation.

Having concluded that the interpretation is incompetent for various reasons, this Court must next ask whether the incompetent interpretation prejudiced the outcome of Defendant's case in that it potentially affected the outcome of the proceedings. In the instant case, the answer is clear that the Defendant was prejudiced. No effective communication

existed between Defendant and the interviewers; they were, so-to-speak, "not on the same page." Bolanos, Ardinger, and Perry believed they were asking one question, while Defendant thought they were asking another. Even in cases where only one or two words were interpreted incorrectly, it completely changed the meaning and tenor of certain questions. In light of the fact that the indictment in this case is based upon statements made during the naturalization interview, this Court finds that the interpretation is so inaccurate as to render it unreliable as evidence of Defendant's actual statements.

The Government's argument that some of these concerns are negated because Millan, Defendant's Spanish-speaking attorney, was present at the interview are completely without merit and unfairly shift the burden for this incompetent interpretation upon defense counsel. First, it is clear from the digital copy that Millan was not present throughout the course of the entire interview. Second, Millan was specifically told at several points during the interview to remain silent or he would forfeit Defendant's right to the naturalization interview. Third, the proposition that an attorney should zealously advocate for his client while at the same time interpreting various Spanish statements and comparing one's own interpretation to that of another interpreter is absurd. Fourth, there is no measurable standard by which this Court can judge Millan's, let alone any attorney's, proficiency in another language. This Court is already tasked with measuring the reliability of the interpretation and

the transcript and will not inquire into the language competency of each defense attorney who represents a non-English speaking client. Finally and importantly, the Government was statutorily authorized to allow Bolanos to conduct the interview without the presence of an interpreter as it appears she is a Spanish speaker herself[4], yet it choose to impose an interpreter into this interview. Not only did the Government impose the interpreter, but when Millan attempted to object to certain questions, Ardinger asked that she be allowed to ask the questions and that they be interpreted.

For the reasons set forth above, the Court finds that the incompetent interpretation prejudiced the outcome of Defendant's proceeding and potentially affected the outcome of both those proceedings and the criminal indictment. The Court further finds that the danger of prejudice resulting from the admission of the interpreted statements far outweighs any probative value they may have because the interpretation was so inherently unreliable. In the end, the statements at issue are not merely evidence of the

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[4] This is evidenced by the fact that she corrected and/or prompted the interpreter during the naturalization interview at several points. *See* 8 C.F.R. § 335.2(f) ("Use of interpreter. If the use of an interpreter is authorized pursuant to § 312.4 of this chapter, the examining officer shall note on the application the use and identity of any interpreter. If the Service officer is proficient in the applicant's native language, the Service officer may conduct the examination in that language with the consent of the applicant.")

crime, they are themselves the relevant crime in this case. Accordingly, the Court will suppress the tapes and transcript as evidence, and further hold that the testimony given at the April 2006 interview should not be considered as evidence in any future hearing because the poor interpretation casts doubt upon its accuracy. *See Perez-Lastor,* 208 F.3d at 783.

B. Government Deception

Defendant moves to suppress any and all statements uttered during the course of his naturalization interview that took place on April 25 through April 27 of 2006, and to suppress any and all audio or video tapes, documents, and notes containing Defendant's statements uttered during the course of these same interviews. Defendant argues that the Government has been assembling a criminal case against Defendant from as early as April 21, 2005, and that even though Defendant did not qualify for naturalization due to his prior convictions in Panama, the Government nonetheless granted him a naturalization interview for the sole purpose of gathering information for use in a criminal prosecution.

The Government responds by arguing that Defendant invoked the need for the interview by filing an application for naturalization, and thus they did not "entrap" him into an interview for the sake of building a criminal case against him. It argues that Defendant knowingly and voluntarily answered all questions posed to him as illustrated by his decision

in exercising his Fifth Amendment rights at various points throughout the interview. The Government contends that it has no duty to "lay its cards on the table" during a naturalization interview.

Though the Defendant couches his argument in terms of the Fourth, Fifth, and Sixth Amendments, the concern in the instant case is more accurately categorized as one of due process. In fact, several courts have addressed the core of Defendant's concern. Some courts refer to the issue as one of due process or abuse of process, some as government deception, and still others as improper administration of justice. *See, e.g., United States v. Blocker,* 104 F.3d 720, 728 (5th Cir. 1997) ("government deception"); *SEC v. ESM Gov't Sec., Inc.,* 645 F.2d 310, 315-16 (5th Cir. 1981) ("deliberate deception" and "abuse of process"); *United States v. Mahaffy,* 446 F.Supp.2d 115, 124 (E.D.N.Y. 2006) ("improper administration of justice"); *United States v. Schroder,* 2006 WL 3717896, at *3 (S.D. Ala. 2006) ("material misrepresentation"); *United States v. Stringer,* 408 F.Supp.2d 1083, 1087 (D. Or. 2006) ("due process"); *United States v. Scrushy,* 366 F.Supp.2d 1134, 1138 (N.D. Ala. 2005) ("improper administration of justice"); *United States v. Teyibo,* 877 F.Supp. 846, 855-56 (S.D.N.Y. 1995) ("improper administration of justice"); *United States v. Parrott,* 248 F.Supp. 196, 200 (D.D.C. 1965) ("due process").

The seminal case addressing this issue is *United States v. Tweel,* 550 F.2d 297 (5th Cir. 1977). In *Tweel,* an IRS agent asked defendant's accountant if he

could review the defendant's tax records as part of an audit. *Tweel,* 550 F.2d at 298. The defendant's accountant asked the IRS agent whether a "special agent" was participating in the investigation. *Id.* The IRS agent's response that no special agent was involved in the investigation, while factually correct, led defendant's accountant to believe that the IRS was merely conducting a civil audit when, in fact, defendant was also the subject of a criminal inquiry. *Id.* at 299. The Fifth Circuit reversed the defendant's conviction for tax evasion and held that mere failure to warn of a criminal investigation, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit, and trickery. *Id.* The Fifth Circuit held that the IRS agent's failure to apprise defendant of the obvious criminal nature of the investigation "was a sneaky deliberate deception by the agent . . . and a flagrant disregard for [defendant's] rights." *Id.* It categorized such conduct as "shocking" and noted that our revenue system is based upon the good faith of taxpayers and that taxpayers should expect the same good faith from their government. *Id.* at 300.

The Fifth Circuit applied the principles announced in *Tweel* in subsequent cases involving alleged government deception and abuse of process. For example, in *Securities and Exchange Commission v. ESM Government Securities, Inc.*, 645 F.2d 310 (5th Cir. 1981), the Fifth Circuit relied on *Tweel* in holding that fraud, deceit, and trickery are grounds for denying enforcement of an administrative subpoena

obtained after an SEC investigator gained access to ESM's offices by misrepresenting his purpose and concealing the fact that the SEC was conducting a formal investigation of ESM. *ESM Gov't Sec., Inc.*, 645 F.2d at 317. The Fifth Circuit noted that the key to *Tweel* was the nature of the relationship between the government and the private citizen, and that:

> Inherent in our democracy is a belief that, since the government represents the will of the people, the people will accept its dictates voluntarily. There is a sense of trust between the government and the people. It was the abuse of this trust which we could not accept in *Tweel*. . . .

Id. at 316.

The Fifth Circuit was particularly concerned with the SEC's deceptive tactics, stating that "[w]e believe that a private person has the right to expect that the government, when acting in its own name, will behave honorably," and further that "[w]e think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust." *Id.* at 316. Indeed, the Fifth Circuit's disgust with the Government's conduct in *ESM Government Securities, Inc.* is best expressed in their own language:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of

> laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means[,] to declare that the Government may commit crimes in order to secure the conviction of a private criminal[,] would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 316-17.

The Fifth Circuit refined these principles in *United States v. Blocker,* 104 F.3d 720 (5th Cir. 1997). In *Blocker,* a state insurance auditor tasked with examining defendant's insurance records came across information which caused him to suspect that the defendant had been engaging in criminal activity. *Blocker,* 104 F.3d at 723-24. He brought this information to the attention of the FBI, and promised to and eventually did supply them with evidence of criminal activity that he encountered during the course of his work. *Id.* at 724. The trial court denied the defendant's motion to suppress the evidence, and the Fifth Circuit affirmed. *Id.* at 725. It rejected the defendant's attempt to rely on "government agent 'deception' cases," distinguishing it from *Tweel* in that the

DOJ had not specifically requested the insurance auditor to gather information regarding criminal activity. *Id.* at 729. Whereas in *Tweel* there was no "genuine" civil audit, merely a criminal audit falsely represented as a routine civil audit, the Fifth Circuit found that Blocker's case involved a genuine civil audit separate and apart from the criminal investigation. *Id.*

While these Fifth Circuit cases involved government deception in the context of securing documents and papers in violation of the Fourth Amendment, various courts also have extended similar principles into the realm of statements acquired in violation of the Fifth Amendment. For example, in *United States v. Guerrina,* 112 F.Supp. 126 (E.D. Pa. 1953), a district court excluded statements obtained by an IRS agent who testified that the purpose of his presence at the defendant's office during what he represented to be an audit was actually to obtain evidence of fraud for contemplated criminal prosecutions, which he did not reveal to the defendant. *Guerrina,* 112 F.Supp. at 128. The district court discussed Fourth Amendment cases in which evidence obtained by stealth was equally as violative of the Fourth Amendment as evidence obtained by force or coercion. *Id.* The court stated, "I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call, and a search for criminal purposes conducted under the guise of an examination for purely civil purposes." *Id.* at 129.

The practice of excluding statements obtained as a result of "government deception" has found widespread acceptance in the context of securities fraud. For example, in *United States v. Parrott,* 248 F.Supp. 196 (D.D.C. 1965), the district court held that the Government could not bring a parallel civil proceeding and avail itself of liberal discovery tactics in order to obtain evidence for a subsequent criminal investigation. *Parrott,* 248 F.Supp. at 199, The Court relied upon its supervisory authority over the manner in which federal agents exercise their power, and stated that:

> [D]ue process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.

Id. at 200 (quoting *Silver v. McCamey,* 221 F.2d 873, 874-75 (D.C. Cir. 1955)).

The court noted the danger of prejudice that results when a defendant testifies at a civil proceeding and is unaware of pending criminal charges. *Id.* The court cited case law indicating that even if defendants are given warnings against self-incrimination in such circumstances, such warnings have little significance when a defendant does not receive an explanation of the true import of the inquiry. *Id.* at 201. Finally, the found the Government's long delay in

returning the indictment, in combination with its deceptive tactics, sufficient grounds to dismiss the indictment. *Id.* at 202.

In another securities fraud case, a district court sitting in New York used a slightly different analysis and rejected the defendant's arguments that his due process rights had been violated. *Teyibo,* 877 F.Supp. at 855-57. In *Teyibo,* the district court noted that "[t]he prosecution may use evidence acquired in a civil action in a subsequent criminal proceeding unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of justice." *Id.* at 855. The court recognized the Supreme Court's language regarding various circumstances that might lead to a finding that a defendant's right to due process had been violated, including cases in which the Government pursues a civil action solely to obtain evidence for a criminal prosecution and cases in which the Government fails to advise the defendant during a civil proceeding that it is contemplating criminal prosecution, but found that in the case at hand the Government had not pursued the civil action solely to obtain evidence for a criminal prosecution. *Id.* at 856. The court also found it important that the relevant SEC investigation continued for more than two years and that the SEC did not consult with the United States Attorney in any substantive way. *Id.* at 856.

In *United States v. Scrushy,* 366 F.Supp.2d 1134 (N.D. Ala. 2005), a district court again had the opportunity to address "whether the Government departed

from the proper administration of criminal justice" in procuring deposition testimony. *Scrushy,* 366 F.Supp.2d at 1137. In *Scrushy,* an accountant with the SEC scheduled a deposition with the defendant for March 14, 2003. *Id.* at 1135. Unbeknownst to the defendant, the SEC accountant received a call from the United States Attorney's Office shortly before the deposition was scheduled to take place that lasted fifteen to twenty minutes, and in which the United States Attorney's Office gave the SEC advice or preferences as to the content of the deposition and its location. *Id.* at 1136-37. During this conversation, the SEC accountant learned that defendant was possibly involved in a massive fraud investigation, but did not disclose this fact to the defendant during their meeting. *Id.* The court held that the civil and criminal investigations "improperly merged" when the SEC agreed to change the location, content, and length of its deposition in order to accommodate the United States Attorney's Office. *Id.* at 1139. The court found that the Government had manipulated the simultaneous investigations for its own purposes, and that such practices deviated from the proper administration of justice. *Id.* at 1140. "Our justice system cannot function properly in the face of such cloak and dagger activities by those charged with upholding the integrity of the justice system." *Id.* at 1139-40.

In *United States v. Stringer,* 408 F.Supp.2d 1083 (D. Or. 2006), the defendant succeeded on a similar strategy, arguing that the Government violated his due process rights because he was not advised that

the prosecutor and the FBI were using the SEC to gather evidence in support of a criminal investigation. *Stringer,* 408 F.Supp.2d at 1087. In *Stringer,* the court found that the United States Attorney's Office identified defendant as a possible target in a criminal investigation and chose to gather information through the SEC because of a concern that the presence of a criminal investigation would involve less cooperative witnesses and witnesses more likely to invoke their constitutional rights. *Id.* at 1087-88. The court found that the United States Attorney's Office consistently believed that criminal prosecution was likely, and was actively involved in the SEC investigation by meeting regularly, receiving documents, requesting location of interviews, advising what information was needed for a successful criminal prosecution, and intentionally hiding its presence from defense counsel. *Id.* at 1088. Finally, the court addressed two standards for dismissing an indictment: (1) that the Government engaged in deceit, trickery, or intentional misrepresentation, and (2) that the Government's conduct was "'so grossly shocking and so outrageous as to violate the universal sense of justice.'" It found that the Government's conduct in the case met both. *Id.* at 1089. The court dismissed the indictment, reserving the right to suppress the statements if the case was returned overturned on appeal. *Id.* at 1089.

A similar strategy appeared in *United States v. Mahaffy,* 446 F.Supp.2d 115 (E.D.N.Y. 2006), wherein the defendant argued, unsuccessfully, that his

statements should be suppressed based on the Government's tactics used in securing his statements. *Mahaffy,* 446 F.Supp.2d at 126. The Court briefed *Tweel, Parrott, Scrushy*, and *Stringer* but found that the Government's conduct in obtaining Mahaffy's testimony was not so egregious as "to constitute a violation of the universal sense of justice." *Id.* at 126. The court found that the SEC's decision to obtain the defendant's testimony was separate and distinct from any investigation by the United States Attorney's Office, the SEC did not receive any suggestions as to the content of their questions, and at no time did the United States Attorney's Office inform the SEC that the defendant was the subject of a criminal investigation. *Id.* More importantly, both defendant and his attorney were well aware of the criminal investigation prior to appearing for questioning in the civil investigation. *Id.*

In this instant case, the evidence is overwhelming that the Government improperly manipulated the administration of criminal justice in order to secure a criminal indictment(s) against Defendant. As an initial matter, the USCIS adjudications officer, Bolanos, testified that she had already determined that Defendant was probably not eligible for citizenship but nonetheless chose to interview him. She testified that she never denied naturalization without an interview, even though the standard practice in El Paso – where Defendant's interview took place – is to deny a petitioner a naturalization interview if it is clear that such petitioner is unlikely to receive

citizenship status. This initial determination of Defendant's ineligibility, Bolanos stated, was based upon Defendant's previous conviction for aggravated assault in Panama.

Though the Government represented to this Court that these facts are not evidence that the naturalization interview was in vain and merely a pretext for a criminal investigation because "an applicant who has received a pardon is not precluded from demonstrating good moral character, [8 C.F.R. § 316.10(c)(2)]," see Gov't's Resp. to the Def.'s Mot. to Suppress Evidence and Statements 2, the USCIS denied Defendant naturalization partly based on that exact reason. *See* USCIS Decision of August 24, 2006 ("[T]here is no indication in the regulation nor in its promulgation that pardons in the naturalization context are to be treated differently from the established rule that foreign pardons do not remove the immigration consequences of convictions. Therefore, *USCIS finds that your pardon is not effective for immigration purposes.*") (emphasis added). By September 27, 2005 – well before the April 2006 interview – the Government had collected extensive materials related to Defendant's conduct and had already held an immigration hearing on whether he should be deported. For the Government to come into this Court and argue that its only purpose in holding the naturalization interview was to determine his good moral character is completely disingenuous. Finally, the interview was anomalous in that: (1) it lasted eight hours over the course of two days as

opposed to the usual maximum of thirty minutes, (2) it involved two interviewers, (3) the Government provided an interpreter, (4) there were a total of four attorneys present – two defense attorneys and two Government attorneys[5], and (5) it was both audio and videotaped.[6] All of these facts tend to indicate that, as discussed in *Blocker* and *Guerrina,* there was no genuine administrative interview and the entire interview was, instead, a pretext for a criminal investigation.

In addition to the irregularities inherent in the interview itself, the Court finds the DOJ's involvement with the case suspicious. For example, Bolanos testified that approximately one month prior to Defendant's naturalization interview, she met with an unnamed attorney from the DOJ and attorneys from DHS to "discuss the flow" of questions. Though she was evasive when pressed to discuss exactly what she meant by "flow," she was very clear that everyone at the meeting "reviewed" the questions. This case is analogous to that of *Scrushy* and *Stringer,* and distinguishable from *Teyibo* and *Mahaffy,* because the DOJ was directly involved in assisting USCIS prepare for Defendant's administrative interview.

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[5] The Court notes that this interview involved more attorneys than most criminal trials before this Court.

[6] Curiously, even though Bolanos refers to the fact that the interview has been videotaped on the second day of the naturalization interview, she now testifies that video is unavailable because the equipment malfunctioned – a first in her experience.

Although the Government provided so-called "warnings" to Defendant at the beginning of the interview, as in *Parrott,* these warnings had little significance. The warnings were read to Defendant in English without any Spanish interpretation, Defendant's attorney was continually threatened that exercise of Fifth Amendment rights might result in termination of the naturalization interview, and, more importantly, Defendant did not receive an explanation of the true import of the Government's inquiry. *See Parrott,* 248 F.Supp. at 874-75; *United States v. Thayer,* 214 F.Supp. 929, 932 (D. Colo. 1963) ("The fact that the accused has been warned that false answers can result in a perjury prosecution can be of little value in circumstances where the defendant may have been misled by the fact that the main object of the investigation appeared to be inquiry as to substantive violations. A warning in such circumstances could not be effectual unless it includes a full disclosure to the effect that a perjury charge is then being contemplated and is almost sure to follow if the defendant persists in the answers which he has been giving.").

While the Government tries to distinguish these many cases based on the fact that each case involved a mandatory Government investigation while Defendant in this case sought a benefit from the Government, the Court finds the argument a difference without distinction in the instant case. Defendant was being held in DHS custody, had been ordered removed but had no country willing to accept him,

and had to choose between applying for naturalization or possibly being subject to indefinite detention. In other words, Defendant had few options and the Government took advantage of his situation and manipulated it to serve its own ends.

This Court finds that the Government engaged in fraud, deceit, and trickery when it misrepresented to Defendant that the purpose of asking him such extensive questions about his means of entry into the United States, his conduct in Panama and Venezuela, and his use of various aliases and passports was merely to "clarify the record." The Court ponders exactly which record the Government sought to clarify. The Government did not merely ask him questions directed towards a moral character determination. They questioned him extensively about bombings and other violent activities. The mere fact that they had to question him about bombings belies the argument that this was a routine naturalization interview.

Furthermore, throughout the interview, Millan attempted to advise Defendant to exercise his Fifth Amendment rights, yet invariably Bolanos, Ardinger, or Perry would retort "this is just for purposes of the record." In addition to engaging in fraud, deceit, and trickery, this Court finds the Government's tactics in this case are so grossly shocking and so outrageous as to violate the universal sense of justice. As a result, this Court is left with no choice but to dismiss the indictment.

III. CONCLUSION

The realm of this case is not, as some have suggested, terrorism. It is immigration fraud. Terrorism, and the determination of whether or not to classify an individual as a terrorist, lies within the sound discretion of the executive branch. It does not lie with this Court.

In 2006, the Western District of Texas saw 2,441 new criminal cases filed, a great number of which involve immigration charges. This Court, in particular, has been noted as having one of the heaviest criminal immigration dockets in the entire nation. As such, the issues with which this Court is currently faced are ordinary, not extraordinary. The Court routinely presides over trials and formulates sentences for defendants facing the same charges as those faced by the Defendant in this case. For example, a typical defendant convicted of all seven counts with which Defendant is currently charged would receive a maximum sentence of six to twelve months under the United States Sentencing Guidelines. In addition, any time that such defendant served in federal incarceration would more likely than not qualify such defendant for time served, or at the very least, probation.

As with each and every defendant who comes before this Court, Defendant in this case is entitled to certain rights under the United States Constitution. This Court will not set aside such rights nor overlook Government misconduct because Defendant is a

political hot potato. This Court's concern is not politics; it is the preservation of criminal justice.

For the reasons set forth above, Defendant's Motion to Exclude Tapes and Transcripts (Doc. No. 82) is **GRANTED** and the transcript, interpretation, and testimony from the hearing are hereby excluded. Defendant's Motion to Suppress Evidence (Doc. No. 80) is **GRANTED** and any and all statements that Defendant uttered during the course of his naturalization interview are hereby suppressed. Finally, the indictment is hereby **DISMISSED**. All remaining motions shall be **DENIED** as moot.

SO ORDERED.

SIGNED on this 8th day of May 2007.

/s/ Kathleen Cardone
KATHLEEN CARDONE
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

September 24, 2008

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 07-50737 USA v. Carriles
USDC No. 3:07-CR-87-ALL

Enclosed is an order entered in this case.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Gena Pelham
Gena L. Pelham, Deputy Clerk
504-310-7700

Mr Paul Edward Ahern
Mr John F DePue
Mr John W Van Lonkhuyzen
Ms Rhonda A Anderson
Mr Arturo V Hernandez
Mr Felipe D J Millan

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50737

UNITED STATES OF AMERICA
Plaintiff-Appellant
v.
LUIS POSADA CARRILES
Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas, El Paso

ON PETITION FOR REHEARING EN BANC

(Filed Sep. 24, 2008)

(Opinion 08/14/08, 5 Cir., ___, ___ F.3d ___)

Before KING, HIGGINBOTHAM, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of the one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn [Illegible] King
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	**No. EP07CR0087**
	18 U.S.C. § 1425(a)
v.	**18 U.S.C. § 1015(a)**
LUIS POSADA CARRILES	**INDICTMENT**
Defendant.	(Filed Jan. 11, 2007)

COUNT ONE
(Naturalization Fraud, 18 U.S.C. § 1425(a))

The Grand Jury charges that:

On or about April 25 and 26, 2006, at El Paso, in the Western District of Texas, the defendant,

LUIS POSADA CARRILES,

knowingly attempted to procure and obtain for himself naturalization as a United States citizen, which was contrary to law, specifically, in violation of Title 18, United States Code, Section 1015(a), in that on or about September 10, 2005, he knowingly subscribed as true under penalty of perjury on his written "Application for Naturalization" (Form N-400), and then on or about April 25 and 26, 2006, he knowingly made under oath during his naturalization interview with, among others, an adjudications officer of the Department of Homeland Security, Bureau of Citizenship and Immigration Services, certain false statements, to wit:

(a) During his naturalization interview, he stated that, in March 2005, he had traveled from Honduras though Belize, and entered the United States over land near Matamoros, Mexico, and Brownsville, Texas, with the assistance of an unidentified alien smuggler when, in fact, he entered the United States at that time by sea aboard the motor vessel "Santrina";

(b) During his naturalization interview, he stated that, in March 2005, while traveling in or though Mexico en route to the United States, he was never in Cancun or Isla Mujeres when, in fact, he traveled to Cancun and Isla Mujeres at that time;

(c) During his naturalization interview, he stated that, in March 2005, while traveling in or through Mexico en route to the United States, he never saw the motor vessel "Santrina" when in fact he boarded that vessel in Mexico at that time and traveled thereon to the United States;

(d) During his naturalization interview, he stated that, in March 2005, while traveling in or through Mexico en route to the United States, he never saw Santiago Alvarez, Osvaldo Mitat, Ruben Lopez-Castro or Jose Pujol when, in fact, all for of these individuals were with him aboard the motor vessel "Santrina" during his passage aboard that motor vessel from Mexico to the United States at that time;

(e) During his naturalization interview, he stated that he had never had any type of documentation, passport or identification from the Republic of Guatemala, when, in fact, he had a fraudulent passport issued by that nation bearing his photograph in the name of "Manuel Enrique Castillo Lopez";

(f) At Part 1 (Your Name) of the N-400, he stated that the only names he had used other than "Luis Clemente Posada Carriles" were "Ramon Medina" and "Franco Rodriguez" when, in fact, he obtained, possessed and used a fraudulent passport issued by the Republic of Guatemala bearing his photograph but in the name "Manuel Enrique Castillo Lopez."

All in violation of Title 18, United States Code, Section 1425(a).

COUNT TWO
(False Statement in Naturalization Proceeding, 18 U.S.C. § 1015(a))

The Grand Jury further charges that:

On or about April 25 and 26, 2006, at El Paso, in the Western District of Texas, the defendant,

LUIS POSADA CARRILES,

did unlawfully and knowingly make a false statement under oath in a case, proceeding and matter relating to, under, and by virtue of a law of the United States relating to naturalization, in that, while under oath

in connection with an Application of Naturalization (Form N-400), the defendant falsely stated to, among others, an adjudications officer of the Department of Homeland Security, Bureau of Citizenship and Immigration Services that, in March 2005, he had traveled from Honduras through Belize, and entered the United States over land near Matamoros, Mexico, and Brownsville, Texas, with the assistance of an unidentified alien smuggler when, in fact, he entered the United States at that time by sea aboard the motor vessel "Santrina"

COUNT THREE
(False Statement in Naturalization Proceeding, 18 U.S.C. § 1015(a))

The Grand Jury further charges that:

On or about April 25 and 26, 2006, at El Paso, in the Western District of Texas, the defendant,

LUIS POSADA CARRILES,

did unlawfully and knowingly make a false statement under oath in a case, proceeding and matter relating to, under, and by virtue of a law of the United States relating to naturalization, in that, while under oath in connection with an Application of Naturalization (Form N-400), the defendant falsely stated to, among others, an adjudications officer of the Department of Homeland Security, Bureau of Citizenship and Immigration Services that, in March 2005, while traveling in or through Mexico en route to the United States,

he was never in Cancun or Isla Mujeres when, in fact, he traveled to Cancun and Isla Mujeres at that time.

COUNT FOUR
(False Statement in Naturalization Proceeding, 18 U.S.C. § 1015(a))

The Grand Jury further charges that:

On or about April 25 and 26, 2006, at El Paso, in the Western District of Texas, the defendant,

LUIS POSADA CARRILES,

did unlawfully and knowingly make a false statement under oath in a case, proceeding and matter relating to, under, and by virtue of a law of the United States relating to naturalization, in that, while under oath in connection with an Application of Naturalization (Form N-400), the defendant falsely stated to, among others, an adjudications officer of the Department of Homeland Security, Bureau of Citizenship and Immigration Services that, in March 2005, while traveling in or through Mexico en route to the United States, he never saw the motor vessel "Santrina" when, in fact, he boarded that vessel in Mexico at that time and traveled thereon to the United States.

COUNT FIVE
(False Statement in Naturalization Proceeding, 18 U.S.C. § 1015(a))

The Grand Jury further charges that:

On or about April 25 and 26, 2006, at El Paso, in the Western District of Texas, the defendant,

LUIS POSADA CARRILES,

did unlawfully and knowingly make a false statement under oath in a case, proceeding and matter relating to, under, and by virtue of a law of the United States relating to naturalization, in that, while under oath in connection with an Application of Naturalization (Form N-400), the defendant falsely stated to, among others, an adjudications officer of the Department of Homeland Security, Bureau of Citizenship and Immigration Services that, in March 2005, while traveling in or through Mexico en route to the United States, he never saw Santiago Alvarez, Ruben Lopez-Castro or Jose Pujol when, in fact, all four of these individuals were with him aboard the motor vessel "Santrina" during his passage aboard that motor vessel from Mexico to the United States at that time.

COUNT SIX
(False Statement in Naturalization Proceeding, 18 U.S.C. § 1015(a))

The Grand Jury further charges that:

On or about April 25 and 26, 2006, at El Paso, in the Western District of Texas, the defendant,

LUIS POSADA CARRILES,

did unlawfully and knowingly make a false statement under oath in a case, proceeding and matter relating to, under, and by virtue of a law of the United States relating to naturalization, in that, while under oath in connection with an Application of Naturalization (Form N-400), the defendant falsely stated to, among others, an adjudications officer of the Department of Homeland Security, Bureau of Citizenship and Immigration Services that he had never had any type of documentation, passport or identification from the Republic of Guatemala, when, in fact, he had a fraudulent passport issued by that nation bearing his photograph in the name of "Manuel Enrique Castillo Lopez."

COUNT SEVEN
(False Statement in Naturalization Proceeding, 18 U.S.C. § 1015(a))

The Grand Jury further charges that:

On or about September 10, 2005 at El Paso, in the Western District of Texas, the defendant,

LUIS POSADA CARRILES,

did unlawfully and knowingly make a false statement under oath in a case, proceeding and matter relating to, under, and by virtue of a law of the United States relating to naturalization, in that he knowingly subscribed as true under penalty of perjury on his written "Application for Naturalization" (Form N-400)

in Part 1 (Your Name) the statement that the only names he had used other than "Luis Clemente Posada Carriles" were "Ramon Medina" and "Franco Rodriguez" when, in fact, he obtained, possessed and used a fraudulent passport issued by the Republic of Guatemala bearing his photograph but in the name "Manuel Enrique Castillo Lopez."

A TRUE BILL

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FOREPERSON

/s/ Michael J. Mullaney/DBD
MICHAEL J. MULLANEY
ACTING UNITED STATES ATTORNEY

/s/ D. B. Deitch
DAVID B. DEITCH
JOHN VAN LONKHUYZEN
PAUL E. AHERN
TRIAL ATTORNEYS, NATIONAL SECURITY DIVISION
UNITED STATES DEPARTMENT OF JUSTICE